United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
Washington, DC 20240

JAN 28 2010

Memorandum

To: Secretary Salazar

From: Mary L. Kendall
Acting Inspector General

Subject: Cape Wind Associates, LLC
Report of Investigation-PI-MA-08-0513-I

In the fall of 2008, the Department of the Interior's Office of Inspector General (OIG) received multiple complaints regarding a Minerals Management Service (MMS) National Environmental Protection Act (NEPA) review of an offshore wind farm proposed by Cape Wind Associates, LLC (CWA) to be located in Nantucket Sound, off the coast of Massachusetts. MMS published a final Environmental Impact Statement (EIS) for the project on January 16, 2009, the final business day of the previous administration.

Our investigation determined that MMS did not violate provisions of NEPA in completing the final EIS for the proposed offshore wind farm; however, several of the federal agencies that worked with MMS in preparing the final EIS were concerned that its completion was unnecessarily rushed by MMS' desire to publish the report prior to the end of the previous administration. While none of the agencies believed that MMS' timeline affected their overall conclusions, each agency expressed frustration at various levels that the timeline prevented them from being as thorough in their reviews as they would have desired.

In addition to the concerns expressed by cooperating federal agencies regarding MMS' timeline for the final EIS, our investigation also determined that several transportation entities located in the Cape Wind Project area, including all three local airports and the two major ferry operators, feel their concerns and comments about the impact of the project to the navigational safety of the area were not adequately considered by MMS.

We are providing this information to you for whatever administrative action you deem appropriate. If during the course of your review, you have any questions, please do not hesitate to contact me at (202) 208-5745.

Attachments

Investigative Report

Cape Wind Associates, LLC

Report Date: January 8, 2010
Date Posted to Web: February 3, 2010

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RESULTS IN BRIEF

In the fall of 2008, the Department of the Interior's Office of Inspector General (OIG) received multiple complaints regarding a Minerals Management Service (MMS) National Environmental Protection Act (NEPA) review of an offshore wind farm proposed by Cape Wind Associates, LLC (CWA) to be located in Nantucket Sound, off the coast of Massachusetts. MMS published a final Environmental Impact Statement (EIS) for the project on January 16, 2009, the final business day of the Bush Administration.

Our investigation determined that several of the Federal agencies that worked with MMS in preparing the final EIS were concerned that its completion was unnecessarily rushed by MMS's desire to publish the report prior to the end of the Bush Administration. None of the agencies believed, however, that the expedited timeline affected their overall conclusions. In order to complete the NEPA review, MMS worked closely with cooperating Federal agencies, among them the U.S. Fish and Wildlife Service and the U.S. Coast Guard. Both agencies indicated that the timeline imposed by MMS pressed them into acting atypically, restricting their ability to be as thorough as they would have liked in conducting such a review. Moreover, the Federal agency responsible for performing the overall review of the EIS, the Environmental Protection Agency, expressed frustration that MMS's timeline unnecessarily limited the amount of interagency coordination needed for such a large, complex project.

MMS also consulted with the Federal Aviation Administration (FAA) outside of the NEPA process. In prior years, the FAA had issued statements that the CWA project would not adversely impact air navigation in the Nantucket Sound area, and these statements were documented in MMS's draft EIS. Days before the final EIS was published, however, MMS learned that the FAA had concluded a study that determined that the project would result in a "Presumed Hazard" to aircraft, yet MMS published the final EIS without acknowledging this new FAA finding, and instead allowed the final EIS to be published with FAA's outdated finding of "no adverse effect."

BACKGROUND

In November 2001, Cape Wind Associates, LLC (CWA) applied for a permit with the U.S. Army Corps of Engineers (COE) to construct an offshore wind farm (Cape Wind Project) in Nantucket Sound, the body of water located between Cape Cod, MA, and the islands of Martha's Vineyard and Nantucket. If constructed, the Cape Wind Project would be the first offshore wind farm in the United States. In November 2004, under the National Environmental Protection Act (NEPA), COE completed a draft Environmental Impact Statement (EIS) concerning the project.

On August 8, 2005, after COE had issued its draft EIA, the Energy Policy Act of 2005 (EPAct) became law (Public Law No: 109-58). The EPAct provided for the Minerals Management Service (MMS) to develop a program and regulations for leasing offshore areas for renewable energy projects, and as a result MMS became the lead Federal agency responsible for the environmental review of the Cape Wind Project proposal.

In January 2008, MMS released its own draft EIS for the Cape Wind Project. In a separate action several months later in June 2008, MMS released draft regulations for alternate energy facilities on

the Outer Continental Shelf (OCS). According to MMS, it submitted the final regulations to the Office of Management and Budget (OMB) in November 2008. Then on January 16, 2009, the final business day of the Bush Administration, MMS released a final EIS for the Cape Wind Project. Meanwhile, the regulations for OCS alternate energy facilities were not promulgated by the end of the Bush Administration – the regulations were ultimately promulgated and published in the Federal Register on April 29, 2009.

As of the date of this report, MMS has not yet issued a Record of Decision (ROD) for the Cape Wind Project, which is required prior to issuance of a lease.

DETAILS OF INVESTIGATION

Complaints

On July 24, 2008, Peter Kenney, a freelance writer and television producer from Cape Cod, MA, sent an email to the Department of the Interior (DOI) concerning MMS's review of the Cape Wind Project. The Department forwarded the email to the Office of Inspector General (OIG). Kenney claimed that CWA proposed in its lease application to MMS to use a specific wind turbine (3.6 Megawatt wind turbine) manufactured by General Electric Company (GE) as "the primary component" in the Cape Wind Project. Kenney claimed, however, that GE no longer commercially produces a 3.6 Megawatt (3.6MW) wind turbine for offshore use and that CWA knew this fact "long before the MMS draft EIS was completed and published" in January 2008.

On September 25, 2008, Sandy Taylor of Yarmouth Port, MA, submitted a letter of complaint to OIG regarding the Cape Wind Project that was signed by 34 individuals requesting that OIG "initiate an immediate investigation into improper actions by MMS in reviewing the Cape Wind energy project proposed for Nantucket Sound." The complaint was signed by several business persons, private citizens, realtors, and a Massachusetts State senator.

Summarized, the complaint alleged:

- That concerned parties, in response to the draft EIS, had determined that the project would do irreparable harm to the economic, environmental, and public safety interests of Cape Cod, Martha's Vineyard, and Nantucket.
- That the project was neither financially nor technologically feasible.
- MMS was cutting legal and regulatory corners in an effort to expedite the Cape Wind Project's review process and approve the project before the Bush Administration left office on January 20, 2009.
- MMS was prepared to make a decision on the Cape Wind Project before regulations were in place for offshore renewable energy projects.
- MMS was giving CWA a "sweetheart financial arrangement."
- MMS was moving the proposal toward approval even though the technology required to build the project is not available.
- MMS was ignoring the advice of the U.S. Fish and Wildlife Service (FWS), and that an FWS employee who submitted critical comments has been reassigned.
- MMS was prepared to move forward with approval prior to completing Historic Preservation consultation.
- MMS was prepared to proceed to approval prior to completing tribal consultation.

- MMS was prepared to move the project to approval prior to receiving final U.S. Coast Guard (USCG) terms and conditions for safe marine navigation.
- MMS was proceeding toward a final decision despite a Federal Aviation Administration (FAA) "presumed hazard determination."
- Because of MMS's overly narrow Purpose and Need Statement for the Cape Wind Project, it has not considered reasonable alternatives, as required under NEPA.
- MMS did not properly address the Cape Wind Project's lack of economic viability.
- MMS failed to follow proper procedures for hiring a consultant to work on the Cape Wind Project EIS, selecting a firm favorable to wind development.
- MMS failed to properly evaluate the presence and handling of hazardous materials used on the project during energy generation.

On December 12, 2008, U.S. Senator Edward M. Kennedy, now deceased, submitted a letter to OIG stating that he is "concerned about how MMS is proceeding" in its review of the Cape Wind Project, and that MMS's "questionable actions deserve thorough investigation, and I urge you to make it a high priority."

In summary, Senator Kennedy's letter expressed his concern that:

- MMS was failing to fulfill its responsibilities with respect to protecting the public interest in its actions on the Cape Wind Project, and that MMS may be in violation of several relevant statutes, including NEPA.
- FWS had undergone a dramatic reversal in its concern about the negative effects of the Cape Wind Project on endangered species.
- A FWS biologist had been reassigned who had insisted that the Cape Wind Project had not completed the requisite studies.
- FWS had made "subsequent changes" in its biological opinion apparently at the request of MMS.
- MMS failed to conduct the required nation-to-nation consultations with the Wampanoag Tribes (Aquinnah and Mashpee), which should have been completed before the release of the draft EIS.
- MMS failed to complete a full review of the project under the National Historic Preservation Act.
- MMS had exerted pressure on other cooperating agencies, such as the FAA and USCG, which were reviewing the project's possible negative impacts on navigational radar systems.
- The FWS regional office in Concord, NH had deep concerns that MMS was not requiring the applicant to conduct all the necessary ecological impact studies.
- The comment letter by FWS also expressed disappointment that MMS was not following appropriate policies.
- MMS did not give FWS a preliminary draft of the EIS, so that FWS could provide comments.
- The draft biological opinion issued by FWS's New England Field Office would have required that the project shut down during the migration season, but this provision was removed during FWS Headquarters' office review.

- MMS pressed forward with the review of the project before promulgating the regulations required to guide such decisions.
- MMS set unrealistic deadlines for FAA and USCG to complete their studies regarding the possible impact of wind turbine interference on maritime and aeronautical radar operation.

OIG Investigation

As of the date of this report, MMS has stated that it has not completed the consultation required under Section 106 of the National Historic Preservation Act (NHPA). Accordingly, due to the lack of ripeness, this report does not address the complaints related to the NHPA Section 106 consultation process.

Based on multiple issues raised regarding the Cape Wind Project, this report is organized into 14 sections in order to address independently all of the issues identified in the initial complaints by Kenney, Taylor and Sen. Kennedy, along with discussing additional issues that were raised during the course of the investigation.

I. In their complaints, Kenney and Taylor both alleged that MMS was moving the proposal toward approval even though the technology required to build the project is not available.

In his interview with OIG, Kenney said that the main allegation of his complaint was that CWA submitted fraudulent/false information to MMS in their application for a permit to construct the wind farm by stating it planned to use a 3.6MW wind turbine manufactured by GE. According to Kenney, this was an intentional misrepresentation because CWA has known since late 2005/early 2006 that GE no longer plans to manufacture a 3.6MW wind turbine for commercial use.

According to Kenney, CWA's misrepresentation is material because only one other company in the world, Siemens Energy (Siemens), manufactures a 3.6MW wind turbine and has never sold such a turbine to any company/project in the United States, and has indicated it does not intend to do so. According to Kenney, due to the fact that CWA will not be able to use/purchase 3.6MW wind turbines, as outlined in their application to MMS, the EIS is essentially worthless and will have to be redone. The reason, Kenney stated, is that any other size turbine that CWA may try to substitute (e.g. 5.0MW wind turbines) would dramatically affect the analysis performed by MMS in completing the EIS due to major differences in the environmental analysis, along with the financial analysis concerning the feasibility of the project.

Kenney stated that he learned about GE's plans not to produce the 3.6MW wind turbines in late 2005/early 2006 – and that CWA also knew this fact – from a former GE executive.
In response to the Taylor complaint noted above, OIG interviewed jointly Sandy Taylor, Glenn Wattley and Clifford Carroll. ***Agent's Note****: Taylor asked that Wattley and Carroll be present during her interview. At the time of his interview, Wattley was the President of the Alliance to Protect Nantucket Sound and Carroll was a private citizen.* According to Taylor's complaint, MMS' draft EIS specifies that the Cape Wind Project will employ 130 GE 3.6MW wind turbines and identifies that the critical calculations for project configuration impacts, such as electricity output, cost, emission abatement, are based on the manufacturer's guarantees. According to Wattley, however,

GE has publicly stated that the 3.6MW wind turbine is only experimental at this time and is not being produced for commercial purposes. Wattley stated that a GE sales representative told him that GE does not have any immediate plans to commercially produce the 3.6MW wind turbines because it is not profitable to do so at this time. Wattley produced a PowerPoint presentation from a conference held in Wilmington, DE, on September 8 and 9, 2008 prepared by Benjamin Bell of Garrad Hassan Group Limited, which indicates that the GE 3.6MW wind turbine is "commercially inactive."

OIG interviewed a former GE executive to inquire about the complaints regarding GE's production of 3.6MW wind turbines. The former GE executive stated that he was not willing to say what GE's intentions are regarding their potential production of the 3.6MW wind turbines outlined in the Cape Wind Project. He stated that he is no longer employed by GE and it would be disingenuous of him to make such a statement on behalf of a company of which he is no longer an employee/representative. He did state, however, that GE's decision to produce such turbines would never be set in stone because ultimately such a decision would depend on market factors at the time of potential production.

The former GE executive also stated that even if GE did not produce the 3.6MW wind turbines for the Cape Wind Project, Siemens does produce such a turbine and he is unaware of any reason why Siemens would not sell 3.6MW wind turbines to CWA for the project.

OIG also interviewed Rodney Cluck, MMS project manager for the Cape Wind Project, on the issue of turbine availability. Cluck stated that MMS was informed about this issue, and as a result MMS made an inquiry with CWA. According to Cluck, CWA responded in a letter to MMS on September 5, 2008 stating that CWA has not changed its intention to use 3.6MW+/- wind turbines in the Cape Wind Project. Cluck provided the letter from CWA, which stated:

> Cape Wind has been aware of this fluid market structure and applied it to the MMS accordingly. It is our belief at this time that a 3.6MW+/- WTG [wind turbine generator] would best serve our project. The market today is currently served by suppliers with commercially available WTGs in this range including Siemens and Vestas. Cape Wind will select a specific supplier and unit in the normal course as the project development and timelines are more clearly defined.

***Agent's Note**: In its proposal to MMS, CWA actually stated that it intended to use a "3.6MW +/- wind turbine," which CWA believes allows for flexibility as to the size and manufacturer of the turbine actually used in the project (See page 45 below).*

Cluck further stated that if CWA decided to change the size of the turbines for the project to either larger or smaller turbines, MMS would need to reevaluate that change. Cluck stated that this reevaluation may trigger a new NEPA analysis, which may result in the need to perform a new Environmental Analysis or an EIS. According to Cluck, MMS would need to conduct an assessment at that time, under NEPA, as to the type of analysis needed, depending on the magnitude of the change.

Robert LaBelle, MMS deputy associate director for the Offshore Energy and Minerals Management division, was also interviewed on the wind turbine availability issue. LaBelle confirmed Cluck's statements, saying that even if the applicant decided to change the technology it plans for the project

at the time of construction, the final EIS would still be applicable unless the change was truly significant. LaBelle then stated that if the change in equipment was a "big change" – such as utilizing 5.0MW wind turbines – MMS would need to conduct a supplemental EIS in order to assess the change.

To address turbine availability directly with GE, OIG interviewed a manager for GE's Alternate Energy Division (wind, solar, etc.), who is responsible for all GE sales of wind turbines nationwide. The manager stated that GE still produces the 3.6MW wind turbine and it is "in their portfolio." He stated unequivocally that notwithstanding GE's recent focus on onshore wind farm projects due to the recent boon in such wind farms, GE's 3.6MW wind turbine would be made available for the Cape Wind Project if the developer, CWA, chooses to contract with GE to purchase them.

OIG also interviewed a director for GE. According to the GE director, the Cape Wind Project has been "his account" since 2005 and he has been the GE contact with CWA from 2005 to the present. According to him, GE has not entered into a contract with CWA to provide the 3.6MW wind turbines because discussions have not yet reached that stage. He said, however, that GE is fully prepared to produce the 3.6MW wind turbines for the Cape Wind Project if CWA chooses to contract with GE to do so.

In addition to contacting GE directly regarding the availability of 3.6MW wind turbines for the Cape Wind Project, OIG also interviewed a sales manager of Siemens. The sales manager reports directly to Siemens' sales manager for the America Division. He confirmed that Siemens does commercially produce a 3.6MW wind turbine for offshore production, and that Siemens is the world's top producer of offshore wind turbines. He stated, however, that Siemens' 3.6MW offshore turbines are predominantly being used in wind farms off the coast of Europe and that to date none have been produced for offshore use in the United States.

When asked whether Siemens would or could produce 3.6MW wind turbines for the Cape Wind Project if requested to do so, the sales manager stated that Siemens could support such a project. He said that if a developer approached Siemens with an urgent request to provide such turbines, Siemens would certainly "sit down and talk to them about their needs." Siemens would be capable of entering into a business arrangement to provide the turbines, he said, if Siemens deemed it to be economically feasible from a business strategy standpoint.

II. In their complaints, Senator Kennedy and Taylor both alleged that MMS was prepared to make a decision on the Cape Wind Project before regulations were in place for offshore renewable energy projects.

During his joint interview with Taylor and Carroll, Wattley stated that the EPAct directed MMS to promulgate final regulations governing alternate energy projects located on the OCS within 270 days of passage (May 2006) – well over 1,000 days prior to his interview. MMS finally released draft regulations in July 2008, after MMS issued the draft EIS on Cape Wind in January 2008. According to Wattley, MMS's failure to promulgate regulations prior to issuing the draft EIS made it impossible for the public to comment adequately on the draft EISs compliance with such regulations.

In an interview, Maureen Bornholdt, MMS program manager for the Office of Alternative Energy

Programs, stated that the office was created in August 2005 in response to passage of the EPAct and that she was appointed to her position at the program's inception. According to Bornholdt, the EPAct granted MMS the authority to regulate alternative energy on the OCS, including potential wind, solar, ocean wave, and any other alternative energy resources. Additionally, she stated that the EPAct identified two ongoing wind farm projects at the time the EPAct was passed: the Cape Wind Project and the Long Island Project. As a result, Bornholdt stated, MMS was essentially given three tasks:

- Develop a regulatory framework for the overall alternative energy program.
- Review the Cape Wind Project proposal.
- Review the Long Island Project proposal.

Bornholdt noted that the EPAct provided no funding to MMS to complete these tasks.

According to Bornholdt, MMS began the tasks by comparing the findings of the draft EIS that had already been completed on the Cape Wind Project by COE to the regulatory framework MMS had in place under the Outer Continental Shelf Lands Act for administration of oil and gas leasing. She stated that MMS gathered a team of its own experts that identified potential alternative energy technologies while working in conjunction with the National Renewable Energy Laboratory (NREL) in Golden, CO.

Bornholdt stated that MMS issued an Advanced Notice of Proposed Rulemaking (ANPR) in December 2005, which essentially asked the public, states, agencies, and others this question: What elements should be in a regulatory program? She stated that the ANPR broke the question down into five components: leasing/access, payments, environmental compliance, inspections, and operations. According to Bornholdt, MMS was familiar with regulating and evaluating energy development on the OCS, but alternative energy technologies were "different stuff."

Bornholdt stated that after MMS reviewed the comments to the ANPR, MMS decided to complete a Programmatic EIS (PEIS) covering all alternative energy technologies on the OCS, such as wind, solar, and ocean wave. According to Bornholdt, while MMS was working on the PEIS the agency was simultaneously developing the framework for the alternative energy regulations addressing the same five components: leasing/access, payments, environmental compliance, inspections, and operations.

Bornholdt stated that the PEIS conducted a "high level study" of the potential alternative energy technologies, which needed to be completed before attempting to identify the necessary processes and regulatory framework. Bornholdt said that MMS completed the PEIS and in January 2008 issued a ROD for the PEIS that contained "Best Management Practices" that developers need to consider when proposing any alternative energy project on the OCS. She said MMS essentially treats these best practices as "guidelines" for the agency to use when considering potential projects.

On the question of whether the Cape Wind Project followed the process outlined in the draft regulations, Bornholdt explained that the project and the drafting of the regulations were being pursued "concurrently" and were on parallel tracks. She stated that as MMS began drafting the regulations – which mainly define the required processes involved in alternative energy projects– the Cape Wind Project was being handled with the same mind set. She explained that, in a way, each process – the Cape Wind Project and the regulation drafting – supported each other and ultimately resulted in a project that helped define what the process regulations would contain.

Cluck stated that MMS sent the final OCS alternative energy regulations to OMB on November 3, 2008. He stated that based on the PEIS that MMS issued, the final regulations do not need to be promulgated prior to MMS issuing the final EIS on the Cape Wind project. Cluck stated that the regulations do not contain engineering standards related to potential projects, but rather "a big chunk" of the regulations generally concerns the process of obtaining a lease. Since the process is essentially completed regarding the Cape Wind Project, Cluck stated that he does not believe the final alternative energy regulations in place would assist in analyzing the final Cape Wind EIS. Cluck did acknowledge that parts of the regulations do concern construction, operation and decommissioning of such projects. The regulations, however, simply require that plans for such activities are in place prior to their occurrence.

The issue of whether MMS can complete both a draft and a final EIS, issue a ROD, or issue a lease prior to issuing final regulations implementing MMS authority over such alternative energy projects was reviewed by OIG's Office of General Counsel. The Office of General Counsel opined: "MMS is proceeding under statutory authority and an interim alternative energy program that do not appear to require MMS to issue regulations before approving Cape Wind."

***Agent's Note**: MMS's final alternative energy regulations were publicly released on Earth Day, April 22, 2009. They are entitled "Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf – 30 CFR Parts 250, 285, and 290," and were published in the Federal Register (FR) on April 29, 2009 at 74 FR 19638.*

III. In their complaints, Senator Kennedy and Taylor both alleged that MMS was ignoring the advice of FWS, and a FWS employee who had submitted critical comments had been reassigned.

As noted above, Senator Kennedy's letter to OIG stated the following:

> It is clear that the regional office of the Fish and Wildlife Service in Concord, New Hampshire had deep concerns that MMS was not requiring the applicant to conduct all the necessary ecological impact studies. The comment letter by the Service also expressed disappointment that MMS was not following appropriate policies. In particular, MMS did not give the Service a preliminary draft of the Environmental Impact Statement, so that the Service could provide comments. The favorable biological opinion on Cape Wind released by the Service on November 24, 2008 is inexplicable, given the Service's April comments.
>
> It also has been reported that the draft biological opinion issued by the New England Field Office of Fish and Wildlife Service would have required that the project shut down during the migration season, but this provision was removed during D.C. office review.

***Agent's Note**: In the course of investigating the allegations related to FWS' overall role in the preparation of the EIS for the Cape Wind Project, we determined that the complainants were confused about the various obligations and multiple, distinct roles of FWS in the NEPA review process. The following explanation describes the two roles the FWS played in its dealings with MMS*

on the Cape Wind Project.

As FWS is a cooperating agency in the EIS process, MMS was obligated to consult with FWS regarding the impact on all avian species that may result from the Cape Wind Project. In addition to this obligation, MMS was also obligated under the Endangered Species Act (ESA) to conduct "Section 7 Consultation" with FWS regarding the two species on the endangered species list: the piping plover and the roseate tern. FWS's role regarding the ESA consultation for these two species was distinct from its role as a cooperating agency regarding all avian species. Although these two roles naturally intertwine, they are guided by separate and distinct legal obligations.

- The April 21, 2008 comment letter that FWS issued in response to the draft EIS was in its role as a cooperating agency to MMS for all avian species.
- The draft and final Biological Opinions (BOs) issued by FWS were completed as a result of Section 7 Consultation MMS was required to conduct with FWS under the ESA.

***Agent's Note**: In order to assist the reader in keeping the distinction between FWS's dual roles and obligations, our findings related to these topics are presented in separate sections, with an additional section comparing FWS's findings in both processes. Our findings related to the circumstances surrounding the reassignment of the FWS biologist is presented in its own section. A final section contains our findings related to the Memorandum of Understanding (MOU) between MMS and FWS, which applies to all future projects and is not specific to the Cape Wind Project.*

- **FWS's April 21, 2008 Comment Letter to the draft EIS**

A biologist for FWS' New England Field Office (NEFO) said that his federal civilian service began when he was hired in by COE specifically to develop EISs for COE. He moved to FWS as a biologist assigned to review NEPA documents, including EISs.

The biologist described the chronology of FWS's involvement with the preparation of the EIS related to the Cape Wind Project, saying that FWS began its agency coordination/consultation on the project with COE in early 2000. According to him, FWS was provided a far greater opportunity to consult with COE as a cooperating agency (via meetings, teleconference calls, document review, etc.) than with MMS after MMS took over the project. He stated he does not know why MMS limited these opportunities for consultation far more than COE. As an example of the comparison of cooperating agency consultation, the biologist stated that COE provided FWS the opportunity to comment on the draft EIS prior to public release, whereas MMS did not.

According to the biologist, he drafted the initial FWS comment letter after MMS released its draft EIS. He said he studied the 2,000-page draft EIS closely and took extensive notes about the issues that affected FWS. After performing this review, he drafted the letter and then worked closely with his supervisor at that time, in editing the letter. The biologist said that after NEFO was satisfied with the content, the letter was forwarded to the FWS regional office where it was reviewed by an Office of the Solicitor (SOL) Attorney Advisor. The biologist stated that after the region signed off on the letter, it was signed by the supervisor and officially released on April 21, 2008.

According to the biologist, the prevailing theme of the comment letter was the criticism that MMS

made many conclusions in the draft EIS regarding the impacts on migratory birds and other aquatic species without adequate baseline data. Specifically, he stated that the draft EIS concluded there were no, or minimal, impacts on these species, yet MMS did not have sufficient data to make such conclusions. According to the biologist, this was "the mantra of the entire document." In fact, according to the biologist, Appendix C of the draft EIS contains several statements by MMS acknowledging that they did not have sufficient data to make conclusions regarding the potential impact on certain species, yet the main body of the draft EIS concluded that there is "no impact" or "minimal impact." He said this resulted in the draft EIS containing blatant contradictions.

In the General Comments section of the letter, FWS stated the following:

> [T]he DEIS [draft EIS] repeatedly and inappropriately draws conclusions regarding anticipated environmental impacts, or lack thereof, in the absence of important site-specific information on natural resources in, on, or in the airspace above Nantucket Sound that would be affected by the project. Chief among these are migratory birds and the benthic and pelagic resources they depend on. We noted the paucity of site-specific information from the inception of project review. Yet despite our continued recommendation that an adequate baseline be established from which to assess impacts and design minimization and mitigation measures, little information has actually been gathered.

The biologist said that general comments made by FWS in the letter pointed out that FWS had attempted to assist MMS in the NEPA review (preparation of the draft EIS), in accordance with DOI policy, by "identifying relevant issues, collecting and assembling necessary information, analyzing data, developing alternatives, evaluating alternatives, and estimating the effects of implementing each alternative." The letter then stated that, "We [FWS] offer these comments for the same purpose. They are appropriately critical given the 'draft' nature of the document reviewed and the numerous unresolved issues and data gaps."

Following the general comments section, the letter made several specific comments regarding the FWS review of the draft EIS. The letter concluded with the following statement:

> In our view, if this project is to move forward through the various regulatory processes facing the application to a defensible decision point, the information needs identified in our scoping letters and EIS comments need to be addressed in a supplemental DEIS. As stated in the closing comments on our July 11, 2006 scoping letter: "We collectively have an opportunity before us now to 'do this right'." Unfortunately, we have failed to do so.

The former (retired) Supervisor for FWS' NEFO has a degree in biology and worked for FWS for 37 years. He stated that he worked extensively on regulatory issues, including wetlands and ESA matters and had extensive experience reviewing EISs that were prepared under NEPA.

The former Supervisor stated that FWS began recommending to CWA in the early stages of the project that CWA start collecting certain types of data in order to assist FWS in assessing the impacts of the project on migratory birds. In fact, he stated that when CWA constructed a metrological tower

in Nantucket Sound in 2001, FWS recommended that CWA install radar on the tower in order to collect migratory bird data. CWA refused, however, claiming the expense was too high, and COE also refused to require CWA to follow FWS's recommendation. The former Supervisor stated that if CWA had followed FWS's recommendation in 2001 to install the radar and collect migratory bird data 24 hours a day, 7 days a week (24/7), the data required to adequately assess the impacts on migratory birds would have been greatly enhanced. According to him, FWS needed three years of 24/7 data in order to "cover the variances" among the typical seasonal differences that occur in between years.

He acknowledged that after MMS issued the draft EIS in January 2008 he signed the April 21, 2008 FWS comment letter in response to their draft EIS. The letter to MMS essentially stated that MMS did not have any of the data necessary to reach a conclusion on the project's impact on migratory birds. He said the comment letter reflected his personal opinion.

We interviewed a biologist in the Endangered Species Division for FWS' NEFO who has worked for FWS for 24 years and has been in NEFO's endangered species division for the past 20 years. The NEFO biologist stated that he did not believe the FWS comment letter on the draft EIS was "unprofessional." According to the NEFO biologist, MMS knew FWS was intending to issue a critical letter and therefore should not have been a surprised when they received the FWS correspondence. With respect to the Cape Wind Project, The NEFO biologist stated that he "never understood" why CWA did not conduct the three-year, 24/7 radar study that FWS recommended in 2001 at the inception of the project. He said CWA knew the project would be controversial and the study could have been completed well within the project's timeline. The NEFO biologist stated that the data that could have been collected from a radar study would have been very helpful to FWS in its analysis of the project.

Michael Thabault is the Assistant Regional Director for Ecological Services for the FWS northeast regional office. Thabault stated that when he arrived at his current position, FWS was working with COE on the draft EIS regarding the Cape Wind Project. Thabault stated the FWS position was that COE had overstated its conclusions based on the data COE collected over the preceding six years and, therefore, FWS recommended that COE collect additional data relative to avian resources in Nantucket Sound.

According to Thabault, when the EPAct transferred obligations involving offshore wind power to MMS, FWS began to work very closely with MMS on their draft EIS. Thabault stated that the FWS stance in its comment letter on MMS's draft EIS was similar to its stance on COE's draft EIS. MMS, he said, overstated its conclusions relative to the impact on avian resources based on the data collected to date. Furthermore, he confirmed that FWS recommended suspending the NEPA process pending more data collection.

Thabault noted that under NEPA, FWS was a cooperating agency and that MMS, as the action agency, was the decision-making entity. In this structure, MMS had no obligation to embark upon the most environmentally protective alternative, but must disclose the impacts of the data analyzed by FWS. Thabault stated the FWS comment letter on MMS's draft EIS suggested ways to gather data that would make the assertions in the draft EIS more supportable. Thabault stated he has not read the final EIS, whereas, he stated that he read, commented on and approved the April 21, 2008 letter

containing FWS's comments on the draft EIS.

Thabault stated that FWS will wait until the ROD is issued to see whether FWS's concerns were addressed. Thabault noted that under NEPA's 30-day "cooling off" period once the ROD had been issued, FWS would have that amount of time to write a letter to MMS expressing FWS's concerns. Thabault expressed his belief that MMS had "plenty of time to do better" in terms of gathering data.

An Attorney Advisor for SOL in the FWS northeast regional office provides legal counsel to FWS on various issues, including the FWS role as a cooperating agency to MMS in the preparation of the final EIS for the Cape Wind Project.

The Attorney Advisor stated that after taking the lead on the project, MMS performed a higher quality analysis of the project than COE. He said MMS still failed, however, to have the draft EIS reviewed by the cooperating agencies, including FWS, prior to its public release. The Attorney Advisor stated that he believes cooperating agencies should have been afforded the opportunity to review the draft EIS and provide input to MMS prior to public release, but he does not know why MMS decided not to do so. The Attorney Advisor qualified his statement by acknowledging there are no "hard rules" on how an action agency interacts with a cooperating agency, but said he simply believes such coordination between MMS and FWS would have resulted in a stronger overall product.

The Attorney Advisor stated that NEFO typically sends any correspondence to SOL (him) for legal review to ensure FWS' stance on a particular subject is coordinated and formalized. He said that he received the comment letter from NEFO on April 8, 2008, and attempted to "sculpt it" by providing a framework to the scientific observations included in its content. The Attorney Advisor explained that he also edited in consideration of the letter's multiple audiences and its potential legal implications. According to him, the crux of the letter was to inform MMS that FWS did not believe enough data had been collected for MMS to arrive at the conclusions in the draft EIS -- data which FWS had specifically requested MMS and CWA to collect in order to make such conclusions.

According to the Attorney Advisor, MMS did not issue a specific response to FWS's comment letter. He pointed out that MMS is not obligated to issue a specific response to comments offered by a cooperating agency, but said MMS should, at the very least, attempt to respond to the comments in the final EIS. He said that MMS did attempt in the final EIS to respond to some of the points in the FWS comment letter, but added that it is not his decision as a SOL attorney whether MMS's response in the final EIS was entirely satisfactory to FWS.

An avian biologist for MMS stated that he reviewed the FWS comment letter to the draft EIS. He pointed out that he started working for MMS after the letter was issued, nonetheless he was asked by MMS to review the letter. The avian biologist said he was told by his MMS supervisors that the signatory of the FWS comment letter had made a big show in the letter of "falling on his sword" because he was preparing to retire shortly after its release, and that the letter had not been properly vetted through the FWS regional office.

We then provided the avian biologist with an email he authored on June 20, 2008, with the subject line reading: **"Houston, We Have a Problem!"** (emphasis included in email). In the email, he

stated:

> I am new to MMS, and undoubtedly ignorant or misinformed about the processes for conducting NEPA and how final decisions are made, but I think it is extremely unlikely that the Cape Wind Project will go forward and be approved by January 2009. It is far more likely, in my opinion, that this proposed project will generate lawsuits and that a judge will issue an injunction preventing the project from going forward until much of the environmental information requested by USFWS [FWS] is obtained. That could delay the project for at least 3 years of monitoring (longer if the lawsuit drags on) and/or cause the applicant to cancel the proposed project.
>
> It appears to me that the Corps of Engineers really botched this project almost from the beginning, and then handed MMS a burning torch flaming end first.
>
> For example, it appears that
>
> - The applicant selected the site and submitted to the Corps an unsolicited proposal for the project.
>
> - The USFWS informed the applicant and the Corps as early as May 2002 of the need for 3 years of monitoring bird use of Nantucket Sound and the Horseshoe Shoals area to provide the information required to adequately inform the NEPA process. That was SIX (6) years ago, and the data were never collected. If the applicant had responded to the USFWS's comments, the project could well have been approved by January 2009, but they did NOT respond, and that is why a judge is likely to stop the project from proceeding and require the 3 years of monitoring. (emphasis included in email)
>
> - Even those conservation organizations that recognize the need to move beyond just fossil fuel energy and who support development of wind energy recognize that each site is unique in its characteristics, must be evaluated on its own merits, and emphasize the need for using good science to acquire adequate information to make those site-specific evaluations and minimize wildlife impacts.

The avian biologist acknowledged that he authored the email containing the above statements, which essentially agreed with FWS's comment letter that not enough data to adequately assess the project's potential impacts on birds had been obtained by the applicant, notwithstanding the early FWS requests to the applicant to obtain such data. He stated that subsequent to his email he learned there is only "one type of radar" that could cover the five mile distance between the project and shoreline, and that particular radar (S band, C radar) is incapable of detecting smaller objects such as birds. He also stated he learned that the "only type of radar" capable of detecting birds has a maximum range of only two miles.

The avian biologist further stated that he personally researched the economics of setting up the needed radar on the meteorological tower in Nantucket Sound and determined it was not economically practical. He supported this statement by explaining that the radars needed are "directional" and, therefore, multiple radars would need to be placed on the tower at a rental cost of

$250,000 apiece, which does not include operation and maintenance costs to run the radar 24/7 over three years.

When Cluck of MMS was asked how his agency responded to FWS's April 2008 comment letter, he stated that MMS held a meeting with FWS to review the letter "line by line." According to Cluck, FWS "stuck to their comments to a certain extent," although FWS Northeast Regional Director Marvin Moriarty said he believed the comment letter had "gone overboard on things" and was "unprofessional." Cluck stated that based on Moriarty's comments Cluck believed that the FWS comment letter was not reviewed beyond FWS's NEFO.

Moriarty is the Regional Director for the FWS northeast regional office. He said he has been the regional director for FWS Region 5 for the past five years and before that was a FWS deputy regional director in Minnesota for 16 years. He stated that he also worked at FWS headquarters in Washington, DC for 10 years, totaling 38 years of service with FWS. Moriarty said that the Cape Wind Project has been a significant issue within FWS since its inception in 2001, and that early on FWS biologists had identified that there was a lack of data for such an offshore wind farm project in Nantucket Sound. He added that he has physically visited the site for the project and noted that it is a "very active migratory bird area."

According to Moriarty, FWS's relationship with the original action agency handling the Cape Wind Project, COE, was "not very good." He stated that FWS was very critical of COE's draft EIS due to the lack of data that COE required the developer to obtain. He stated that FWS was encouraged when MMS became the action agency after passage of the EPAct because MMS is a part of DOI, and he believes MMS is "more scientifically oriented" than COE. He cited examples of projects in the past involving MMS where he observed they used "good science." Moriarty acknowledged, however, that the FWS comment letter on MMS's draft EIS was similar to the critical comment letter FWS issued on COE's draft EIS -- specifically, that MMS did not require the developer to provide the data needed to adequately address the potential impact of the Cape Wind Project on avian species.

Moriarty was asked if he ever stated to Cluck that he believed FWS's April 2008 comment letter was "unprofessional" or had "gone overboard on things." Moriarty responded that he does not remember ever making such statements to Cluck, or in fact ever speaking to MMS whatsoever about the comment letter. Moriarty stated that FWS stands by the content of the April 21, 2008 comment letter to the draft EIS.

- **Biological Opinion (BO) issued under the Endangered Species Act (ESA)**

In his joint interview with complainant Taylor and Wattley, Carroll stated that FWS recently issued their BO finding that the Cape Wind Project will not jeopardize the existence of the endangered species identified to be potentially impacted by the project: the piping plover and the roseate tern. Carroll stated that he believes the original BO drafted by staff biologists is most likely "quite different" from the final BO issued by FWS because the BO was altered by upper management in order to support a favorable finding for the final EIS. Carroll requested that OIG review the iterations of the BO as it was forwarded from staff biologists to SOL and FWS upper management in order to assess whether changes were made to the document for non-biological, political purposes.

Michael Amaral is the Endangered Species Division Supervisor for FWS's NEFO. According to Amaral, he has worked for FWS for 31 years and has been the supervisor of NEFO's endangered species division for the past 20 years. Amaral said he has been heavily involved in evaluating the Cape Wind Project on behalf of FWS since the project's inception and was one of the authors of the BO that evaluated the project's potential impact on the endangered species identified in the area. According to Amaral, unlike the April 21, 2008 comment letter, the BO focused exclusively on the piping plover and the roseate tern.

Amaral explained that the purpose of a BO is to make a finding whether a potential project will place an endangered species in "jeopardy" of extinction or not, resulting in a finding of "non-jeopardy." Amaral stated that a finding of jeopardy does not mean the potential project is "dead," but rather that FWS would then consult with the developer to "salvage parts of the project" by agreeing on "reasonable and prudent alternatives." If the BO makes a finding of non-jeopardy, FWS then proposes several "reasonable and prudent measures (RPM)" to the developer in order to "limit the take (killing)" of the endangered species. He confirmed that the BO for the Cape Wind Project made a finding of non-jeopardy.

Amaral stated that he and the NEFO biologist drafted the BO in NEFO, which was forwarded to the FWS regional office. Following consultation with the regional office, a draft BO was sent to MMS on October 31, 2008. According to Amaral, the draft BO contained several RPMs, including one to halt operation of the wind farm during specific high-migratory periods and certain weather conditions in order to limit the killing of the plover and tern. Amaral stated that MMS properly forwarded the draft BO to the developer of the Cape Wind Project, CWA. After reviewing the BO, CWA formally responded that the RPM to restrict operation of the project was "not reasonable because it does not meet the legal standard for imposing project restrictions, i.e., measures may involve only *minor* changes."

According to Amaral, CWA conducted an independent study of how the RPM would detrimentally affect the economics of the project and concluded that the RPM would "significantly impact the project," as opposed to being a minor change to the project. Amaral provided to the OIG a formal response from CWA's legal advisors which argued that the RPM to restrict operations would result in significant changes to the project, and therefore is not an allowable RPM to impose on the project. Amaral stated that based on both CWA's response and its consultation with MMS, MMS decided to remove the RPM restricting operation as a mandated condition under the BO because it does not meet the "minor change rule."

Agent's Note: *The final BO, without the RPM requiring operational shutdowns during certain specific times and conditions, was issued by FWS on November 21, 2008.*

According to Amaral, the typical process of preparing a BO was not followed for the Cape Wind Project. He said that the signatory authority for a non-jeopardy finding is typically held within the field office, but that the Cape Wind Project BO was reviewed and signed at the regional level. Amaral stated that he personally requested the region to assist in the preparation and review of the BO due to the high-profile nature of the project, and the input by the regional office was extremely valuable, in addition to the input from the SOL Attorney Advisor.

In his interview, Amaral disagreed with the allegations that the regional office modified the findings of NEFO in order to comply with departmental pressure to ensure a favorable finding for the Cape Wind Project, or that the process to reach a finding was rushed by directing NEFO to abbreviate the process. Amaral stated that the opposite occurred, and that the input from the regional office actually extended the time needed for completion because the regional office insisted that the scientific findings in the BO be thoroughly reviewed in order to produce a more "legally defensible" document.

Amaral addressed the point in the FWS April 2008 comment letter that FWS had requested CWA to conduct a three-year, 24/7 radar study, and CWA's refusal to do so, saying that he agreed that the radar study would have significantly increased the amount of valuable data needed to analyze the project. Amaral pointed out, however, that the radar study would not have assisted FWS in preparing the BO and an analysis of the endangered species because the radar would not be able to distinguish between different species.

Amaral stated that MMS had made it clear that they were indeed trying to complete the final EIS and issue the ROD prior to the end of the Bush Administration. Amaral said he does not believe that the department was telling MMS *what* the final decision/conclusion regarding the project should be, but rather was trying to establish a timeline for completion.

Amaral said that as the deadline to complete the final EIS drew closer, he realized that FWS and MMS needed "much more time" to complete their work comprehensively on the BO. Amaral stated that he believes one area that was compromised due to the rushed timeline was the monitoring plan that MMS included in the final EIS. According to Amaral, there was no peer review of the monitoring plan and it appeared to him that MMS' only ornithologist must have worked close to 24-hours-a-day for 3 weeks to prepare the monitoring plan. According to Amaral, the final product reflects this.

The NEFO biologist stated that he co-authored the Cape Wind Project BO withhis supervisor, Amaral. The NEFO biologist said he believed that the timeline designated by MMS compromised the BO, but that the timeline pressure did not affect the ultimate determination in the BO of 'non-jeopardy. He said, however, that he feels that FWS was rushed in preparing the RPMs, and stated that the RPMs were essentially just "tacked on" at the end without much reflection because of FWS's attempt to comply with the MMS timeline.

Thabault stated there was no pressure from FWS upper management or from MMS regarding the Cape Wind Project BO. He stated that FWS received a "lot of information from MMS," and added that the role of FWS "was not to be obstinate, so we tried to facilitate agency timelines when we could." Thabault noted that FWS requested a 60-day extension of the consultation period to December 3, 2008, and MMS responded with a different timeline. Thabault added that FWS did not meet MMS's suggested timeline.

Commenting on the quality of the FWS BO dated November 21, 2008, Thabault stated that "you could always do better," but given the quality of people involved, nothing was compromised. Thabault noted that the non-jeopardy decision was made long before the deadline. He said FWS would have voiced concerns to MMS if there were "any questions as to the biological impacts of this project."

Thabault noted there were two issues that were outstanding at the end of the BO process: monitoring and temporary shutdowns of operations. Thabault stated FWS received feedback from MMS and the project CWA regarding the temporary shutdown of operations. Thabault stated FWS relied upon MMS to decide what was reasonable and prudent. Thabault said, "There was a decision made collectively by the FWS that we, given the amount of information that MMS was providing to us, saying it [temporary shutdown of operations] was not reasonable and prudent, we cannot as the FWS override their technical expertise around their own authorities, jurisdictions and expertise that they had in among themselves and for which they brought in from the applicant. So we did make a decision to take that out based on MMS's pushback because we don't have the capability, expertise, or the credibility to counter that at some point in time." Thabault stated that FWS "did a bang up job [on the BO] given the time constraints we had and the information we had."

The SOL Attorney Advisor stated that he believes the final BO that was issued on November 21, 2008, was a comprehensive document that was "robustly" supported by science. [Exemption 5]

In sum, the SOL Attorney Advisor explained that a change between a draft BO and a final BO that includes a controversial issue [Exemption 5] should always be adequately explained in supporting documentation, indicating an independent review of the issue by FWS. [Exemption 5]

The SOL Attorney Advisor concluded by observing that MMS ultimately postponed the timeline for completing their final EIS based on the need to give USCG more time to complete their analysis of the project. Accordingly, the FWS BO did not need to be completed in such a rushed manner, he said. [Exemption 5]

Martin Miller is the Chief for Endangered Species for the FWS northeast regional office. Miller stated that he agreed with Amaral that more time would have been helpful to allow FWS to work out the details of the monitoring plan included in the BO. That would reduce the risk of needing to adjust the plan at a later time. Miller explained, however, that FWS has the option of "re-initiating" the Section 7 Consultation process if it can be shown the monitoring plan is failing.

According to Miller, FWS regularly communicated to MMS its desire for more time to strengthen the BO, yet MMS held to its timeline, regardless of the fact that FWS was receiving necessary data from MMS up to the very day the BO was finalized. Miller stated there was a great deal of pressure on FWS to finalize and issue the BO within the MMS timeline. In fact, he stated that he was forced to skip a week-long policy meeting he was hosting as the regional chief of endangered species in order to review the BO prior to the date that MMS had set for it to be issued. Miller stated that the rush to complete the BO did not make much sense to him because it was in the best interest of both MMS and the developer to ensure that the BO was as legally defensible as possible.

In his interview, the avian biologist was provided an email he had authored after reviewing the draft BO. In the email he stated, "I did not find that the 'Reasonable and Prudent Measures [RPM]' section contained anything unreasonable." He was asked why he apparently changed his view on the RPM, which required an operational shutdown of the wind farm during certain seasonal time frames and foggy conditions. According to the avian biologist, after taking a closer look at the reasons cited by FWS to support the occasional operational shutdown, he determined that the reasons were not

biologically justified. Accordingly, he authored Attachment B to MMS's argument against the RPM explaining his views.

The avian biologist was provided an email he authored on October 20, 2008 to several potential external reviewers regarding the avian/bat monitoring plan he developed for the BO. In the email he stated, "Frankly, we just ran out of time for external review and needed to send our monitoring proposal to the Fish & Wildlife Service as part of Section 7 Consultation without external review in order to meet timelines." After reviewing the email, he was asked if he believes this failure to conduct external review of the avian/bat monitoring plan – due to the timeline created by MMS for its completion – may have compromised the plan. He stated that he does not believe the plan was compromised due to the lack of external review.

Agent's Note: *The lack of peer review for the monitoring plan was one of the facets of the BO that Amaral believes was compromised due to MMS' unwillingness to extend the deadline for the BO.*

- **Comparison of April 21, 2008 FWS Comment Letter to the draft EIS, and FWS' BO**

Moriarty was asked if the non-jeopardy finding in the BO effectively recanted FWS's stance in its April 2008 comment letter, which was highly critical of the MMS draft EIS due to the lack of avian migratory data. Moriarty stated that the BO did not in any way change the FWS position that there is a significant lack of data to make an adequate assessment of the impact on all avian species in the Nantucket Sound area. Rather, he said, the BO only pertains to the two species on the endangered species list: the piping plover and the roseate tern.

Additionally, Moriarty explained that FWS is required to make BO findings based only on the currently available data and FWS cannot mandate that the developer of a proposed project obtain more data. Accordingly, he added, the two positions of FWS related to the Cape Wind Project -- 1) a non-jeopardy finding in its BO for the two species on the endangered species list, and 2) FWS's comment letter criticizing MMS's draft EIS due to a significant lack of data -- do not contradict one another. Moriarty stated that FWS still believes it did not have the data necessary to make an adequate assessment of all avian species in that area. Based on the data FWS were provided, he said, the agency made the finding in the BO that the project would not jeopardize the existence of the two species on the endangered species list.

- **The Biologist's Reassignment from the Cape Wind Project**

The biologist was officially removed from working on the Cape Wind Project in June 2008 by his then-acting supervisor, Marjorie Snyder via an emailed "Project Reassignment Memo." According to this memo, Snyder stated that she was reassigning the biologist from the Cape Wind Project, along with other projects, due to his "combative and unprofessional behavior exhibited towards partners of [FWS]."

The former FWS supervisor of NEFO, stated that the biologist is opinionated in his writing and that he, often "massaged" the biologist's draft letters in order to tone them down. Considering this fact,

the former supervisor said he believes the biologist authored a letter critiquing a different wind farm project's assessment after his retirement that was not "massaged" and the regional office chastised the biologist for writing the letter.

Snyder is the Deputy Assistant Regional Director, Habitat Conservation Division, Ecological Services at the FWS northeast regional office. Snyder stated that she became the acting supervisor for NEFO on May 5, 2008, for a 60-day detail. According to Snyder, she reassigned the biologist in June 2008 and personally made the decision without any pressure from FWS management. Snyder stated she had never read the April 21, 2008 FWS comment letter to the draft EIS, and accordingly, her decision to reassign the biologist was in no way related to his involvement with the project.

Snyder stated that the biologist's behavior warranted his reassignment. Snyder stated that FWS received a letter from the office of Maine U.S. Sen. Olympia Snowe about the Wells Harvard Dredging Project, as well as a letter from the Vermont Agency of Natural Resources on the Sheffield Wind Project, both complaining about the biologist. Snyder described the biologist as a "problem child" who "does not play well with others." Snyder also described the biologist as a "combat biologist" who liked "throwing up road blocks" and was "uncooperative," which was inconsistent with the way FWS conducted business.

Snyder also cited an incident in the NEFO office in which the biologist used "totally inappropriate language and remarks that could not be ignored, and so all this stuff happening in a month was amazing to me." Snyder stated she could have easily ignored this as she was on a temporary detail. She thought the biologist's behavior was "inappropriate," however, and he "was not representing the FWS to the external partners in a way that he should have been." Snyder stated she coordinated her efforts to reassign the biologist with the FWS Human Resources Department, FWS Field Operations, and an SOL attorney.

Snyder provided a Counseling Memo dated June 24, 2008, addressed to the biologist, as well as the Project Reassignment Memo dated June 30, 2008. Snyder stated she requested that FWS Field Operations attend the meeting with the biologist in which Snyder gave him the counseling memo because she had "no trust in him at all and I would not want to be alone with him." Snyder noted that the biologist showed no remorse for the things he had done and that he did not think he had done anything wrong. Snyder stated that based upon his "controversial way of conducting himself, I decided that it would be appropriate to reassign him from these other projects, so it was not just Cape Wind, it was anything that had controversy, I didn't think he should be allowed to continue in because his representation of the Service and because of how he treated other peers in the Service."

According to a manager in Ecological Services, shortly into Snyder's term as acting supervisor for NEFO, the biologist had an altercation with a fellow FWS employee. The manager stated the biologist was using foul language and was acting in an intimidating manner. In addition to this altercation, the manager also cited the two letters received by FWS from Sen. Snowe's office and the Vermont Agency of Natural Resources regarding the biologist's job performance. Both letters were complaints about FWS representations at work groups. The manager stated all these issues came together in the same week and therefore something needed to be done to rectify the situation.

The Ecological Services manager discussed the matter with Snyder and a human resources specialist.

The manager stated Snyder worked directly with the Human Resource Specialist on drafting a counseling memo to the biologist. The manager recounted that he and Snyder met with the biologist regarding the counseling memo. In sum, the manager confirmed that the biologist's reassignment from the Cape Wind Project was a direct result of his behavior and was not a result of outside pressure or any political motivation related to the project.

Thabault stated that the biologist was reassigned from the Cape Wind Project, as well as other FWS projects, due to the "probable hostile work environment" he created, as well as several "strongly worded language" letters that were sent out to FWS project partners. Thabault characterized the letters written by the biologist as "harsh" and "overreaching our authority" in certain instances.

- **Memorandum of Understanding (MOU) between MMS and FWS**

Clint Riley is the FWS Deputy Division Chief for the Division of Migratory Bird Management. According to Riley, his division is responsible for overseeing national policies related to MOUs between FWS and other federal agencies, as required under Executive Order 13186. Riley stated that since the Executive Order was signed, FWS has been working with 10-12 different agencies in creating MOUs, which are in various stages of drafting.

Riley explained that the MOUs are agreements between FWS and other agencies establishing that the agencies will take all conservation measures practical in order to reduce the impacts of various projects on migratory birds. Riley pointed out that the MOUs are not entered into in order to ensure compliance with various laws, such as the Migratory Bird Treaty Act (MBTA).

Riley stated that the MOU between MMS and FWS would apply to all future projects within the scope of the MOU, not just the Cape Wind Project, and the process of developing the MOU has been off-and-on for a period of approximately three-to-five years. He pointed out, however, that the Cape Wind Project has been a driving factor in a recent effort to finally complete the MOU because of the project's potential negative impacts on migratory birds. He stated that the project has apparently resulted in a "heightened awareness" by MMS for the need to complete the MOU.

Riley stated again that the MOUs are not intended to specifically address MBTA compliance, but rather are intended to seek agreement between FWS and federal agencies on conservation measures. He stated that the MOUs are related to the MBTA, but they are "not a direct fit," and therefore an MOU will not provide "protection from the MBTA."

Riley was then asked if, pursuant to an MOU with a federal agency, FWS will "look the other way" if an incidental killing of a migratory bird does occur. Riley said that an MOU will not serve as a "get out of jail free card" for an agency that has signed an MOU with FWS. Indeed, he pointed out that FWS could not legally provide such a release of liability to an agency because there is currently no regulatory framework in place that would allow FWS to "exempt" an agency from provisions of the MBTA.

Riley further explained, however, that the existence of a completed MOU provides FWS with a starting point in ensuring that the agency is taking all available conservation measures necessary to avoid the incidental killing of migratory birds. Therefore when FWS law enforcement reviews a

potential incident prosecutorial discretion can be applied more readily because it may be easier to assess whether the agency has done all it could to avoid the incidental killing. Riley explained that MBTA enforcement actions by FWS try to focus on situations where an entity either intentionally "disregarded the MBTA" in its actions, or there were clear conservation measures available to avoid the killing, yet the entity intentionally chose to ignore such measures.

***Agent's Note**: Following Riley's interview, MMS and FWS finalized an MOU "Regarding Implementation of Executive Order 13186" on June 4, 2009.*

IV. In their complaints, Senator Kennedy and Taylor alleged that MMS was prepared to move the project to approval prior to receiving final USCG terms and conditions for safe marine navigation:

In his joint interview with complainant Taylor and Wattley, Carroll stated that wind turbines, whether on land or offshore, cause significant radar interference. Over the past four years, Carroll has sent MMS substantial documentation from both Britain's Arm's Warfare Center (military agency) and Coastal Maritime (USCG equivalent) establishing that offshore wind farms have significantly "degraded their navigation systems."

Carroll said that at a September 2008 hearing in Falmouth, MA, the developer, CWA, presented a report on radar interference it had been asked to produce by USCG. According to Carroll, CWA's presenter and expert, Captain Dennis Barber, a consulting partner at Marico Marine in Southampton, U.K., told the audience that the report was not based on a "scientific report." Wattley stated that he asked Captain Barber for the data supporting the report and Barber admitted that the report was not based on any particular data set.

According to Carroll and Wattley, among those present at the hearing were the head of USCG for the Cape Cod area, the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (WMNSA), the Passenger Vessel Association, and Hy-Line Cruiselines (Hy-Line). Wattley and Carroll said that because the report was clearly inadequate, the USCG Captain stated he would commission an independent $100,000 study to analyze the potential impact on radar and navigational from the Cape Wind Project.

Carroll said that besides stating he planned to commission an independent report addressing radar interference, the USCG Captain also stated that USCG would hold another workshop/stakeholder meeting with Cape Cod citizens to discuss the report's findings as well as Search and Rescue (SAR) and other issues not discussed in the first workshop. Since that time, however, Wattley said that the USCG Captain has "pulled back" on this promise and stated in a November 4, 2008 letter that there would not be a second workshop.

Carroll also produced letters from U.S. Congressman James Oberstar, the Chairman of the House Committee on Transportation and Infrastructure, to Admiral Thad Allen, Commandant of USCG and then-DOI Secretary Dirk Kempthorne. In his September 12, 2008 letter to Allen, Oberstar stated, "I am deeply concerned that the Coast Guard and the Department of the Interior have not jointly developed clear and binding nationwide navigation safety standards for the Department's new offshore renewable energy development program."

Cluck stated that USCG's independent radar study was completed and MMS had received draft mitigation measures from USCG regarding the Cape Wind Project which are "broad and general." Cluck said the USCG Captain informed him that USCG was not prepared to issue "specific" mitigation measures at that time.

According to Cluck, the draft mitigation measures have identified that there will be "moderate impacts" to vessel traffic inside the array of turbines, whereas MMS initially believed the impact would only be "minor." Cluck explained that this finding of a greater impact does not necessarily put the mitigation measures "outside of the scope" of the final EIS, but rather USCG will need to recommend an appropriate level of mitigation to overcome the impact. According to Cluck, USCG is required to provide "terms and conditions" for the project under Section 414 of the Coast Guard Authorization Act so that the language of the terms and conditions may be included before issuing a lease, not necessarily before MMS issues the ROD.

The USCG Captain had been the USCG Sector Commander for Southeastern New England for approximately one year when interviewed and had been involved in reviewing the Cape Wind Project on behalf of USCG during that timeframe. According to him, MMS has been "very accommodating" with the timeline for producing the draft and final EIS for the Cape Wind Project. He stated that USCG was meeting the timeline requested by MMS until the developer of the project, CWA, presented their radar study, along with project opponents presenting a radar study; the two studies reached opposite conclusions.

The USCG Captain stated that before the release of the two opposing reports USCG was considering commissioning its own study, yet he concluded that an independent report was necessary following the concerns voiced by the local operators (ferries, fisherman, etc.). According to the USCG Captain, the decision to commission the third radar report was the circumstance that created the "time crunch" in meeting MMS's preferred timeline for issuing the final EIS.

The USCG Captain said that the contractor hired to perform the radar study was asked to answer only one question: "What will marine operators see on the radar when operating in/around the turbine array?" The contractor was not asked to make recommendations about risk, hazards, or impact. Accordingly, he said, the contractor looked at the projected design of the turbine array and plugged that information into a simulator to produce a report that would tell USCG what the radars would show when presented with different scenarios regarding number of vessels, direction, and other information.

Under section 414 of the Coast Guard Authorization Act of 2006, the USCG Captain stated, the general terms and conditions USCG provided to MMS that were included in the draft EIS are still valid and "meet the statutory requirements" of USCG. He explained that the terms and conditions are the "overall project framework," which can be modified through specific mitigation measures as the project moves forward and the measures become more readily definable. He purposely did not recommend the creation of "buffers of navigation" around the turbine array because he believes that would have caused a change in the "footprint of the project" that could unnecessarily "kill the project."

The USCG Captain said he was satisfied overall with the independently commissioned radar study. He acknowledged there still are many unknowns, yet he believes that with the information provided in the three radar studies USCG will be able to reduce the risks to a level that would ensure navigation safety. He stated that USCG has submitted SAR operation requirements to MMS and he believes that USCG can meet its SAR standards (two-hour response time) in and around the project's turbine array.

According to the USCG Captain, USCG has operated somewhat differently in its review of the Cape Wind Project than when normally scoping out potential projects that could affect navigation safety. He stated that USCG typically reaches out to all affected operators and stakeholders and regularly interacts with them in order to create transparency and determine the best course of action. He said that under the Cape Wind Project, however, USCG is "only a cooperating agency" and, therefore, he believes USCG needs to "stay in their box" and not "get ahead of MMS." Accordingly, the USCG Captain explained that USCG would attend MMS-sponsored events and only respond to questions submitted to MMS. As a result, he stated, USCG has been forced to change its approach from interacting freely with operators and stakeholders to "see what we can do" and only taking actions that USCG is "legally required to do."

The USCG Captain explained that the independently commissioned radar study report was completed after the public comment period was closed, and therefore USCG was not technically allowed to release the report for public comment. The report was only "presented" to stakeholders and operators and not put out for public comment or for questions and answers. He reiterated that the report was used only as a source for data and it did not make any conclusions or assessments on navigational safety. Rather, he said, USCG would make such assessments based in part on the data from the report and from other data and information sources.

The USCG Captain said that he has spoken directly to representatives from the WMNSA and the Massachusetts Fishermen's Partnership, Inc. about their concerns of the hazards of navigation and loss of commercial fishing grounds. He said he has spoken off-the-record with a few persons from these groups and has been able to partly assuage their fears. He reiterated that USCG is not operating in its typical manner – having direct, open communication with these groups – and he believes this has caused the groups to feel anxious and nervous about the Cape Wind Project.

Notwithstanding USGS's inability to meet directly with operators and stakeholders due to its role as a cooperating agency with MMS, the USCG Captain said he does not believe that the MMS timeline compromised USCG's ability to ensure public safety on the sea. He emphasized that USCG is not simply a "regulatory agency" on this project, but is itself a user of the affected area. USCG personnel operate in Nantucket Sound, Perry emphasized, and he would neither send his personnel into an area he believed to be a navigational hazard, nor would he ever state that an area "is safe" when he knew it was not.

When asked if MMS's timeline amounted to "political pressure" on USCG that resulted in compromising navigational safety, the USCG Captain said it was explained to USCG that the timeline was indeed tied to the end of the Bush Administration. He said he believes that based on the timeline USCG probably got "shortchanged a bit" regarding its involvement in the process but not to a degree that jeopardized safety. He acknowledged, however, that this "shortchange" has left USCG

"vulnerable" to claims that it has not adequately reviewed all public comments and listened thoroughly to stakeholders and operators. He concluded by stating that he has never been told by anyone to grant undue deference to the Cape Wind Project regarding safety issues.

A Captain and a manager of WMNSA were interviewed regarding several comment letters WMNSA has submitted to DOI, MMS, and USCG on the Cape Wind Project.

The Captain stated that he has several years of experience on the sea with all types of vessels and has been a Captain for WMNSA for the past six years. According to the Captain and the manager, WMNSA is a "quasi-state entity" that differs from a private company in that WMNSA is "legislatively mandated" to operate regardless of weather or other hazardous conditions. The Captain and the manager said that WMNSA is mandated to operate by law because the residents of Nantucket and Martha's Vineyard rely solely on WMNSA ferry services to transport heating oil and liquefied petroleum gas to the islands; there is no other method of transportation available to deliver these vital products.

According to the Captain and the manager, the ferry regularly "tacks" its course based on the severe weather conditions prevalent in Nantucket Sound. The Captain stated that the tacking is necessary due to the combination of weather and the tides, and this tacking can cause major deviations from the projected ideal ferry routes. He explained that the tacking could even result in a ferry entering the Horseshoe Shoals footprint of the proposed Cape Wind Project. Regardless of whether the ferry would need to enter the wind farm, any potential tacking will be affected by the presence of the wind farm. WMNSA has estimated that the existence of the Cape Wind Project would require its vessels to burn approximately 300,000 gallons of additional fuel per year at an annual cost of more than one million dollars.

In addition to WMNSA's concern with the tacking issue, the Captain and the manager stated that both the draft EIS and the final EIS essentially ignored the frequency and severity of ice events in Nantucket Sound; an array of 130 wind turbines over a proposed area of 25 square miles in the middle of Nantucket Sound will restrict the natural ice flow needed to dissipate the ice.

According to the Captain and the manager, every time WMNSA raised navigation safety issues to MMS, MMS deferred to USCG. Several times WMNSA tried to express its concerns about the Cape Wind Project to USCG, both in person and in letters. The Captain and the manager said, however, that USCG has acted atypically from its usual conduct in such matters, and they have been told that USCG has not answered WMNSA's concerns and questions "based on advice from their [USCG] legal counsel."

The Captain stated that the radar report commissioned by USCG was completely inadequate in addressing the radar interference that will occur as a result of the wind farm. He stated that he believes the study was so inadequate and was no better than a "high school project" because it only addressed a few scenarios with only a couple of vessels at a time. He stated that the public was not allowed to ask questions about the radar study at the one hearing USCG convened to present the study.

The Captain stated that USCG's handling of navigational safety concerns for the Cape Wind Project

has been "past the point of embarrassment." According to the Captain and the manager, the current Captain for USCG in Woods Hole has done a "poor job" dealing with the vessel operators in the area. He stated that the USCG Captain is not a "ship driver" who is familiar with the use of radar usage on a large commercial vessel, whereas he may have "used radar on a small boat." The Captain does not believe, however, that the USCG Captain is capable of assessing the effects of the wind farm on navigational safety and potential radar interference based on the radar study commissioned by USCG.

In sum, the Captain and the manager stated that they feel WMNSA has been completely ignored in the MMS review of the Cape Wind Project. They said that they believe WMNSA's comments on navigation safety should have received at least a modicum of recognition due to the group's legislatively mandated role, adding, however, that this clearly has not occurred.

WMNSA submitted several comment letters to DOI, USCG and MMS explaining their significant concerns about the potential impact on navigational safety from the Cape Wind Project, as well as a map of Nantucket Sound identifying WMNSA and Hy-Line (private ferry operator) ferry routes as they relate to the proposed footprint of the Cape Wind Project.

Hy-Line, which in addition to WMNSA has submitted several comment letters to DOI, MMS, and USCG regarding the Cape Wind Project. An executive for Hy-Line stated that Hy-Line operates high speed ferry services between Hyannis, MA (Cape Cod – mainland), and the islands of Martha's Vineyard and Nantucket. Hy-Line vessels travel routes within navigable channels in Nantucket Sound, he said, and create a triangle around the proposed footprint of the Cape Wind Project. According to the Hy-Line executive, due to the close proximity Hy-Line routes to the project – often within one-half mile of the wind farm – his company is very concerned about the safety risks associated with traveling so close to the potential wind farm.

The Hy-Line executive reiterated many of the same concerns related to sea navigation raised by WMNSA including radar interference, restricted ice flow, and the potential for collisions. Overall, he stated that Hy-Line is very uncomfortable with how USCG has addressed the many sea navigation safety issues raised by the ferry operators. The Hy-Line executive said USCG has done an inadequate job of conducting the review of the project and that "none" of his company's concerns/comments have been properly addressed by the government. He said that Hy-Line has developed the impression that the project is a "bag job" – in that a decision to approve the project had been made "from day one" – and therefore the public's comments and concerns were rendered meaningless.

The Hy-line executive stated that even if USCG eventually issues specific terms and conditions for the wind farm that affect navigational routes – in an attempt to promote safety – the mitigation measures will require the ferry operators to alter their current routes and expend far more fuel, resulting in cancellations and a negative economic impact on the companies. He said that he questioned how the government could approve a new private venture in federal waters that will clearly affect the safety of the current users of those federal waters, along with detrimentally affecting other private operators that have been using the area for years. He concluded that he believes the potential wind farm could not have been placed in a worse spot, inasmuch as "millions of people" transit Nantucket Sound annually by air and sea.

Edmund B. Welch is the Legislative Director for the Passenger Vessel Association (PVA), which submitted comment letters on both the draft and final EIS. Welch stated that PVA is a trade association representing U.S. flagged commercial passenger vessels throughout the United States. He said PVA represents most ferry companies and agencies in the country, among them WMNSA and Hy-Line, and that PVA's representation of the two ferry operators is why PVA became involved in reviewing the EIS process on the Cape Wind Project.

Welch said that he is an attorney and an active member of the North Carolina State Bar. Before working for the PVA, he was the Chief Counsel for the U.S. House Committee on Merchant Marine and Fisheries from 1981 through 1993. Although that committee no longer exists, during his time as the lead attorney, Welch said, the committee regularly held congressional oversight hearings on marine issues, including oversight of USCG.

Welch said that it was his impression that MMS "handed off" the issue of marine navigational safety to USCG, which should have been done because USCG is the agency responsible for such safety matters. Indeed, Welch stated that he believes that USCG needs to take a "central role" in regulating navigation safety for these types of projects because the PVA foresees many similar offshore projects in the future that will affect marine navigation routes.

According to Welch, in 2007 USCG produced a Navigational Vessel and Inspection Circular No. 02-07 (NVIC), entitled *Guidance on the Coast Guard's Roles and Responsibilities for Offshore Renewable Energy Installments (OREI)*. Welch believes, however, that USCG failed to follow its own NVIC in completing the review of the Cape Wind Project.

Welch stated that he believes that MMS addressed PVA's comments to the draft EIS by referring them to USCG. In turn, Welch stated that USCG "rushed" through its review and reached conclusions regarding navigational safety that PVA found quite surprising and does not agree with. According to Welch, Section 414 of the Coast Guard and Maritime Transportation Act of 2006 (CGMTAct) requires that USCG specify "the reasonable terms and conditions the Commandant determines to be necessary to provided for navigational safety with respect to" the Cape Wind Project. He said that he believes that USCG met this obligation at the most minimum level and that USCG could legally argue that it fulfilled the obligation under Section 414 by establishing the general terms and conditions that were published in the draft EIS. Welch does not believe that USCG adhered to the spirit and intent of the law.

Welch explained that in several meetings held by USCG on the Cape Wind Project, the USCG Captain made it clear that he believed it was USCG's role solely to review the project *as proposed* and that USCG was not conducting a review from the standpoint of determining how the project may potentially be modified or altered to make it as safe as possible. According to Welch, by approaching the review in this manner USCG was not exercising its full authority to make suggested adjustments to the project in order to enhance safety. As an example, Welch stated that USCG has an entire program that regularly requires private owners of bridges to modify their bridges for safety purposes, whereas USCG's approach to the Cape Wind Project, for some unknown reason, was more "restrained" in that USCG apparently did not consider suggesting or demanding modifications to ensure navigational safety.

Welch further stated that the CGMTAct was intended to provide USCG the authority to impose terms and conditions on the *developer* of a project, as opposed to imposing terms and conditions on the current maritime users of the affected area. He said that is exactly what USCG is doing with respect to the Cape Wind Project – informing the users of the area what *they* must do in order to be safe. Welch explained that this creates a situation where the original maritime users are being told by USCG to adjust how they do business based on the specifications of a project proposed by a private developer, rather than USCG informing the new developer how it needs to adjust the project so that the use of the area by the current ferry operators, fisherman, and recreationists is not detrimentally affected. According to Welch, this situation is contrary to the legislative history of the CGMTAct, which clearly establishes that the terms and conditions developed by USCG were to be imposed on the developer, not the current maritime users.

Welch offered his observations of how USCG has proceeded in reviewing the Cape Wind Project, saying that he is "astounded" that USCG has apparently acquiesced to the developer's project specifications. He said that he believes that if a catastrophic sea accident were to occur after construction of the project USCG would be held liable. Welch reiterated that he has worked closely with USCG over the past 30 years and has observed other agencies attempting to "rush" USCG into approving a project. He said USCG had always "pushed back" in order to ensure navigational safety, although this has not occurred with USCG's review of the Cape Wind Project.

Welch stated that during his 20 years working on Capitol Hill he had never observed USCG, or any other federal agency, deliberately restrict comment periods and meetings with the public regarding a public project. In fact, he stated that an agency typically allows the public to comment "ad nauseam." Accordingly, he believes that USCG's actions tacitly display that a decision on the Cape Wind Project had already been reached prior to the "review." He reiterated that this is very much "out of character" for USCG; he stated that one cannot help but wonder "what is going on behind the scenes?" Welch added that PVA and the ferry operators have not restricted their comments and observations regarding navigational safety to the USCG Captain's level but have sent comment letters directly to USCG Commandant Allen in Washington, D.C.

In summary, Welch stated that he is not critical of how MMS handled the navigational safety issue because the agency properly deferred the issue to USCG. He stated, however, that he believes the unilateral timeline the MMS imposed on USCG to complete the review – so that MMS could issue the final EIS on the Cape Wind Project before the end of the Bush Administration – "absolutely" resulted in USCG inappropriately rushing through the review process. In fact, Welch said that USCG publicly stated several times that it was not the lead agency reviewing the project and therefore needed to comport to the schedule set by the lead agency, MMS. Welch stated that he believes this situation clearly compromised USCG's review of navigational safety related to the Cape Wind Project.

V. In her complaint, Taylor stated MMS was proceeding toward a final decision despite an FAA "presumed hazard determination."

During the joint interview with complainant Taylor and Wattley, Carroll stated that shortly after the Cape Wind Project's inception, the FAA issued a "Determination of No Hazard" without consulting local airports. He stated that after the finding was issued all of the local airports and air traffic

controller organizations sent letters outlining their concerns with the project to the FAA and COE. Carroll provided an October 18, 2004 letter from the National Air Traffic Controllers Association to COE voicing their concerns about the project's impact on Visual Flight Rules (VFRs) for the area.

According to Carroll, the determination by FAA was valid for two years, after which a new determination would be issued. As a result, Carroll stated, the FAA ignored the concerns of the local airports and air traffic controller organizations and reissued the "Determination of No Hazard." After an additional two years, however, the FAA was required to make a new determination. This time, based on all of the documentation submitted to the FAA, the agency issued a "Presumed Hazard Determination."

***Agent's Note**: According to the FAA, the Public Notice that was issued at the time of the second determination merely created a "default finding" that there is a "presumed hazard" until the FAA's review is complete. A default finding is different than an actual Presumed Hazard Determination, which is only made after the FAA determines there is a "physical or electromagnetic interference with an air navigational system" (See next page for full discussion).*

According to Carroll, this "Presumed Hazard Determination" was issued approximately six months before MMS issued the draft EIS. When the draft EIS was issued, however, it cited the FAA's previous "Determination of No Hazard." According to Carroll, since the FAA issued the "Presumed Hazard Determination," an FAA Obstacle Evaluation Team met with all three affected commercial airport managers at FAA headquarters in Washington, DC and the FAA ordered an independent radar study, which has not yet been completed.

***Agent's Note:** Following Carroll's interview, the FAA completed its initial review of the Cape Wind Project's potential impact on the radar systems of the three local airports and issued an actual Presumed Hazard Determination on February 13, 2009.*

In addition to citing the FAA review of the Cape Wind Project, Carroll stated that the Department of Defense (DOD) believes the project could interfere with the national air defense system. Carroll also provided a July 8, 2008 letter to the FAA from Barnstable Airport manager, Nantucket Memorial Airport manger, and Martha's Vineyard Airport manager, which concluded with the following statement:

> While we all believe strongly in the need for renewable energy, the placement of a 25 square mile wind plant in the middle of three of the busiest airports in the state, in some of the most unpredictable weather conditions on the East coast, poses an unacceptable risk to both our aircraft operators and passengers.

Cluck stated that a "presumed hazard determination" is a default position of the FAA rather than an actual finding that the project poses a hazard to aerial navigation. Cluck then stated that the FAA told MMS that they believe their determinations are excluded from the considerations of NEPA, thus the FAA will not necessarily complete their analysis of the project prior to MMS' issuance of the final EIS or ROD, but rather before the construction phase. Cluck provided a letter to MMS from the FAA dated November 12, 2008, which supported Cluck's statement that the FAA believed their review of the project was outside of the NEPA process**.**

When we asked for the MMS response to the July 8, 2008 letter to the FAA in which the regional airport managers said they believed the project "poses an unacceptable risk to both our aircraft operators and passengers," Cluck responded that MMS is not an expert in air navigation and thus needs to rely on agencies such as the FAA to assess these issues.

The complainants stated in their interview that the DOD had concerns with how the project could affect their radar systems in the area. Cluck stated that a past DOD study determined that the project will not detrimentally affect defensive radar systems. In fact, Cluck provided a memorandum issued by the U.S. Air Force on March 21, 2004, that stated: "Our experts have reviewed the proposed locations for the Wind Power Plant near Cape Cod AFS [Air Force Station] and have determined it poses no threat to the operation of the PAVE PAWS radar at Cape Cod AFS."

U.S. Air Force (USAF) Lieutenant Colonel Philip McNairy is with the Ground Based Missile Warning Defense and Surveillance division with the Headquarters Air Force Space Command at Peterson Air Force Base, Colorado. Lt. Col. McNairy was contacted by OIG in order to confirm the continued accuracy of the USAF's March 21, 2004 memorandum regarding potential impacts, if any, to the PAVE PAWS radar system at Cape Cod AFS by the Cape Wind Project. Lt. Col. McNairy stated that he can unequivocally confirm that the project will not have any impact on the PAVE PAWS radar system at Cape Cod AFS.

Kevin Haggerty**,** the Manager of the Obstruction Evaluation Service for the FAA, was interviewed by OIG on January 7, 2009. According to Haggerty, the FAA became involved in reviewing the Cape Wind Project in 2003 after being asked to review the project's effects on air travel in the area. Haggerty stated that the FAA performed a study at that time and subsequently issued a No Hazard Determination. According to Haggerty, the effects on radar from wind turbines were not well known at that time and there was no objection to the Determination.

Haggerty stated that the FAA typically grants one extension to a Determination, and on October 5, 2004, the FAA reviewed the data of its original report and granted an extension of its 2003 No Hazard Determination. He stated that after the extension was granted, a petition was filed claiming that the Determination was in error and the petitions supported its claim by providing to the FAA several British studies regarding an offshore wind farm's effects on air navigational radar systems.

Haggerty stated that after conducting a discretionary review, on February 2, 2007, the FAA re-affirmed its No Hazard Determination. However, after learning that turbines were being proposed to be placed within three miles of the coast, the FAA issued a Public Notice on April 25, 2007, stating:

> The structure above [wind farm] exceeds obstruction standards. To determine its effect upon the safe and efficient use of navigable airspace by aircraft and on the operation of air navigation facilities, the FAA is conducting an aeronautical study under the provisions of 49 U.S.C., Section 44718 and, if applicable, Title 14 of the Code of Federal Regulations, part 77.

According to Haggerty, such a Public Notice creates a "default finding" that the there is a "presumed hazard" until their review is complete. He explained that such a default finding is different that an

actual Presumed Hazard Determination, which is only made after the FAA determines there is a "physical or electromagnetic interference with an air navigational system" (e.g. local airport). Haggerty said that based on the default finding that there is a presumed hazard, the FAA issued a January 11, 2008 letter to Congressman William Delahunt, which stated, "After the FAA issued a presumed hazard determination for the Cape Wind Project, the case was published for public comment." Haggerty stated that this letter's wording was poor because it created the impression that the FAA had made an actual Presumed Hazard Determination, rather than simply a presumed hazard default finding.

Following their April 25, 2007 Public Notice, Haggerty stated that the FAA commenced studying the project more in depth and in furtherance of the study, the FAA met with all concerned airports and dispatched a group of FAA specialists to the regional airports. The FAA specialists included experts in radar and air traffic control and based on the specialists' findings, the FAA recently concluded that the project will indeed create a "physical or electromagnetic interference with an air navigational system," and therefore the FAA would be issuing an actual Presumed Hazard Determination within the next one-to-two weeks of his interview date (January 7, 2009). According to Haggerty, in conjunction with the Presumed Hazard Determination, the FAA will also be issuing a new Public Notice stating that the project exceeds obstruction standards under Title 14 of the Code of Federal Regulations, part 77 (14 CFR 77), and the public notice will provide the opportunity for the public to comment on its findings. ***Agent's Note****: Following Haggerty's interview, the Presumed Hazard Determination was issued by the FAA on February 13, 2009.*

According to Haggerty, after the new Public Notice is issued, the FAA will then conduct a full aeronautical study of the project, including consideration of the public comments received. Haggerty stated that after concluding its study, the FAA will make determinations whether the project's "interference with an air navigational system" could be mitigated or not. If the FAA determines that the interference can be mitigated, the FAA would then conduct negotiations with the developer of the project in an attempt to agree on appropriate mitigation measures. If the FAA and the developer agree on mitigation measures, the FAA will then issue a final Determination of No Hazard to Air Navigation that includes the conditions of mitigation. If the FAA determines that the interference cannot be mitigated, however, the agency will issue a Determination of Hazard to Air Navigation.

Haggerty reiterated the statements he made in his December 2008 letter to Cluck: "It is the FAA's position that Part 77 determinations are excluded from the consideration of the National Environmental Policy Act of 1969 (NEPA)." In other words, he explained that the FAA believes that an FAA determination is not required for MMS to complete its final EIS.

Based on Haggerty's statement on January 7, 2009 that the FAA had concluded that they will be issuing a Presumed Hazard Determination, OIG contacted Cluck on January 12, 2009, in order to determine if Cluck knew of the FAA's intention to issue the hazard determination. After being informed of Haggerty's statement that the FAA intended to issue the hazard determination, Cluck stated that he had not received any such information from the FAA.

In addition to stating that he had not received any information from the FAA about their recent study/finding of an interference hazard, Cluck stated that if he had received such information prior to the final EIS being delivered to the Environmental Protection Agency (EPA) on January 9, 2009, he

would have "recommended" that such a finding be included in the final EIS in order to be as "transparent" as possible. However, he stated that since MMS did not receive such information from the FAA prior to January 9, 2009, the final EIS cannot be stopped/modified once it has been delivered to the EPA.

The same day, January 12, 2009, OIG informed MMS Deputy Director Walter Cruickshank about the FAA's intention to issue a Presumed Hazard Determination in relation to the Cape Wind Project. In response, Cruickshank stated that he was completely unaware of the FAA's intention to issue a Presumed Hazard Determination for the Cape Wind Project. Cruickshank also stated that he believes that MMS Director Randall Luthi had also not been told about the finding, speculating that if Luthi had learned of the FAA finding, Luthi would have informed him.

According to Cruickshank, notwithstanding the fact that the final EIS had already been delivered to the EPA, if MMS deemed it necessary to do so, the final EIS could be held back from being published in the Federal Register on January 16, 2009, as scheduled. Cruickshank stated that he was not certain whether the FAA's recent finding of a hazard would warrant such an action, but rather that would be a decision made by MMS Director Luthi and the department. Cruickshank also added that, after release of the final EIS, MMS could issue a "supplemental" EIS that contained the FAA's finding if MMS deemed it necessary.

Sheri Edgett-Baron is the National Program Manager for FAA's Air Traffic System Operations Obstruction Evaluation Service, who has been working with Haggerty regarding their review of the Cape Wind Project. Edgett-Baron stated that she had spoke with Cluck on Wednesday, January 14, 2009, and informed him that the FAA will be issuing a Presumed Hazard Determination regarding the Cape Wind Project. On January 15, 2009, via email, Edgett-Baron forwarded to OIG a copy of the draft statement the FAA intended to issue regarding their hazard determination, which she stated was also sent to Cluck (MMS).

***Agent's Note**: At the time Edgett-Baron informed Cluck about FAA's intention to issue a Presumed Hazard Determination for the Cape Wind Project (January 14, 2009), MMS planned on having their final EIS published in the Federal Register two days later, on January 16, 2009. The final EIS was indeed published on January 16, 2009 without any indication that the FAA would be issuing a Presumed Hazard Determination for the project.*

Moreover, although both MMS and FAA have stated that FAA's review is outside of the NEPA process, and therefore FAA's most up-to-date finding is not required to be included in the final EIS, it should be noted that MMS did included FAA's previous finding that the project would: "have no substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities," in the final EIS that was published on January 16, 2009, along with the statement that FAA's "subsequent determination is pending." See Page 5-253 of final EIS.)

The airport manager for the Barnstable Municipal Airport stated that he was a helicopter and seaplane pilot for USCG for 31 years and was the Chief for SAR operations for USCG for the entire Boston region for four years. Additionally, he also served as the USCG Group Commander at Woods Hole, Massachusetts in charge of SAR operations for the entire southeastern New England region for three years, which includes Nantucket Sound. According to the airport manager, he retired from

USCG in 1995.

The airport manager stated that he believes the potential placement of the wind farm in the center of Nantucket Sound is "foolish, crazy, and unsafe." He explained that the location of the wind farm would be directly in the middle of the current visual flight rules (VFR) routes between Barnstable Airport, Martha's Vineyard Airport, and Nantucket Memorial Airport.

Based on his extensive SAR experience, he believes the location of the proposed wind farm would greatly hinder SAR operations in that area. He stated that the typical low visibility for that area (due to low clouds) and the "incredible" amount of boating and shipping traffic in that area will result in significantly compromised SAR responses, either by air or sea. When informed that USCG stated that they feel comfortable that they will be able to meet the regulatory required "response time" for SAR operations with the wind farm present, the airport manager stated that the "response time" required under regulations is defined as how quick USCG can deploy in response to a emergency call, rather than how quickly and safely they can actually reach a victim. Accordingly, the fact that the wind farm is present would, understandably, not affect "response time," although he believes it will definitely affect how long it takes to reach a victim, and more importantly, how safely USCG can reach and assist a victim. According to the airport manager, the Barnstable Airport Commission submitted comments to the final EIS completed by MMS regarding the Cape Wind Project to both the FAA and MMS that voiced the airport's concerns regarding the Cape Wind Project.

The airport manager for the Nantucket Memorial Airport was a signatory to the July 8, 2008 joint letter submitted to MMS by the three airport managers in the Nantucket Sound area that voiced their concerns about the impact of the Cape Wind Project to their respective airports.

According to the airport manager for the Nantucket Memorial Airport, his major concerns regarding the Cape Wind Project involve safety. He stated that he believes the potential wind farm will greatly impact VFR air traffic over Nantucket Sound, which will in turn greatly increase the already congested air traffic in the area because pilots flying VFR will be forced to avoid the footprint of the wind farm on days with low visibility – which he stated occurs quite regularly and often happens with very little warning. He added that he also is concerned that many pilots will end up not adhering to the regulatory height restrictions in order to avoid steering around the wind farm and this will result in a constant safety issue for the area.

In addition to his concerns regarding VFR air traffic over Nantucket Sound, similar to the airport manager of the Barnstable Municipal Airport, he stated that he was also very concerned about the wind farm's potential impact to SAR operations in and around the wind farm. Additionally, Peterson stated that he is not convinced that the radar issues that were documented by the FAA can be mitigated. In sum, he stated that he and other airport managers have continuously raised their safety concerns as they relate to VFR flights, radar issues, and SAR issues, yet MMS and the FAA have not "given these issues the weight" of consideration they deserve. He stated that it appeared to him that MMS came into reviewing the Cape Wind Project with "their minds already made up."

He submitted a comment letter to MMS on January 9, 2009, that expressed his views on how MMS has failed to adequately consider input from the local airports regarding air safety in furtherance of completing the final EIS for the Cape Wind Project.

The airport manager for the Martha's Vineyard Airport stated that he reviewed, but did not submit comments to the draft EIS for the Cape Wind Project. According to the airport manager, he has concerns about how the project will affect air navigational safety in the Nantucket Sound area, including his airport, and he has communicated these concerns directly to the FAA rather than to MMS. He signed a joint July 8, 2008 letter jointly with the airport managers of the Barnstable Airport and the Nantucket Memorial Airport, which expressed several concerns to the FAA about the Cape Wind Project. In addition, he stated that he recently submitted a letter on April 29, 2009, to the FAA with specific concerns of his airport regarding FAA's ongoing review of the project's impact to air navigational safety.

According to the airport manager for Martha's Vineyard Airport, neither MMS nor the FAA has adequately analyzed the impact to local communities that will result from project's resultant displacement of aviation concerning VFR flights. He stated that the project will definitely result in VFR flight traffic being displaced from their normal routes in inclement weather in order to avoid the wind farm, and that displacement will result in a far greater concentration of air traffic over local communities on Cape Cod and both the Islands, thus increasing noise and carbon emissions over those communities.

The airport manager for Martha's Vineyard Airport stated that project will clearly have an impact on the SAR operations in the area of the wind farm. He stated that the there is no question that any SAR operation being conducted via air (e.g. by helicopter) will be impeded by the presence of the project, and in his mind, this is unacceptable.

He stated that another area of definite impact the wind farm will have on air navigation operations is related to the medical evacuation flights from the Islands to the hospitals in both Hyannis and Boston, Massachusetts. His airport supports at least one medical evacuation per day in the off-season and many more in the summer time, due to the aging population of retirees and vacationers to the Island; and the wind farm will have a definite impact on both instrument flight rules (IFR) and VFR medical evacuation flights.

The airport manager for Martha's Vineyard Airport explained that if an evacuation flight is attempting to leave in inclement weather and the wind farm has a detrimental impact on the radar capabilities of the airports, obviously the flight will be impeded. Additionally, if a VFR flight is being attempted in low clouds, additional time will be required to "fly around" the wind farm, thus resulting in extra time needed to have the patient arrive at a hospital. According to him, both of these scenarios result in added time to medical evacuation flights where time is clearly of the essence, which he says is unacceptable.

VI. In her complaint, Taylor stated that because of MMS' overly narrow Purpose and Need Statement for the Cape Wind Project, it has not considered reasonable alternatives, as required under NEPA.

During his interview with complainant Taylor and Carroll, Wattley stated that the Purpose and Need Statement issued by MMS in the draft EIS was too narrow to adequately assess alternatives, but rather it is fashioned in a way that results in the predetermined outcome that the Cape Wind Project is

the only feasible project.

Wattley stated that there are other alternatives that were not adequately analyzed by MMS in the draft EIS, such as deep water sites. According to Wattley, the draft EIS stated that deep water technology – versus shallow water technology (Cape Wind Project) – is 10-to-15 years away. Wattley said that this statement is untrue. According to Wattley, a European company called Blue H USA, LLC (Blue H) is currently pursuing a deep water wind farm project. Additionally, Wattley produced a June 26, 2008 letter signed by the entire Massachusetts Delegation (U.S. Senators and U.S. House Representatives) to MMS encouraging MMS to "evaluate the application submitted by Blue H USA, LLC, for a limited-term lease authorizing data collection and technology testing in support of alternative energy production on the OCS."

According to Wattley, however, MMS has apparently put Blue H's application into the "not now basket." Wattley stated that Blue H representatives have approached MMS, and MMS has told them that they need to wait until the OCS alternative energy regulations are finalized. According to Wattley, by telling other companies, such as Blue H, that they must wait until the regulations are finalized, MMS is essentially stonewalling all other companies except for CWA. Wattley stated that this is another example of how CWA is apparently being "given the inside track" on producing alternate energy on the OCS at the expense of the public.

MMS Alternative Energy Program Manager Bornholdt stated that on November 6, 2007, MMS announced in the Federal Register an interim policy for authorization of the installation of offshore data collection and technology testing facilities in Federal waters. ***Agent's Note****: The Cape Wind Project did not fall under this interim policy because it had been proposed six years prior (see below discussion in Section IX).* According to Bornholdt, MMS accepted comments and nominations until January 7, 2008, regarding the authorization of OCS activities involving the installation of meteorological or marine data collection facilities to assess alternative energy resources (e.g., wind, wave, and ocean current) or to test alternative energy technology and the interim policy is in effect until the MMS promulgates final rules.

Agent's Note*: Bornholdt's interview occurred prior to release of the final alternative energy regulations in April 2009.*

Bornholdt stated that Blue H submitted its nomination under the interim policy in March 2008, after the first group of nominations was accepted prior to the January 7, 2008 deadline. Bornholdt explained that MMS accepted Blue H's nomination after the January deadline, although it was not included in the first group of nominations that MMS began to review and process. Accordingly, MMS did not begin reviewing Blue H's nomination at that time, and as of this date of Bornholdt's interview (April 8, 2009), MMS has not yet reviewed Blue H's nomination.

Bornholdt explained that interim policy provided for the opportunity for various interested parties to "install meteorological or marine data collection facilities to assess alternative energy resources or to test alternative energy technology." Under the interim policy, however, a company could not "operate" an alternative energy facility. In other words, if MMS approved their nominations, the companies could test and collect data, but their interest in the potential sites could never become a lease for actual operations. Bornholdt explained that only after the final alternative energy

regulations are promulgated, could an interested company actually submit an application for a lease that would allow the operation of a facility.

***Agent's Note**: CWA's application for commercial lease did not fall under this interim policy because it was submitted to the government seven years prior in 2001.*

Regarding Blue H's nomination for testing and data collection under the interim policy, Bornholdt stated that MMS has not yet reviewed the nomination at the current time (due to the fact that Blue H's nomination was not submitted by the January 2008 deadline and was not in the first group of nominations MMS began reviewing first). Also, the Secretary of the Interior stated that he was committed to having the final alternative energy regulations promulgated in early 2009 and that it would not make sense to begin reviewing the Blue H nomination now under the interim policy. According to Bornholdt, this situation has been articulated to Blue H representatives by MMS.

A manager for Blue H provided background related to Blue H's achievements with developing deep-water floating wind turbines. The manager stated that Blue H installed the world's first floating wind turbine prototype in the Southern Adriatic Sea off the coast of Italy in the summer of 2008. Additionally, the company is currently building the first operational 2.0MW unit, which it expects to deploy at the same site in 2009 as the first unit in a planned 90MW offshore wind farm.

The manager for Blue H explained that deep-water floating wind turbines would be far more economic and energy efficient than shallow water wind farms, such as the one envisioned in the Cape Wind Project. He stated that the deep-water floating turbines would be constructed on land at a cheaper cost, and could be towed into land for needed maintenance at a far cheaper cost than constructing and maintaining fixed wind turbines in the ocean. Additionally, the winds are far greater in deep water versus shallow water, and therefore the energy generated by a deep-water wind turbine would be greater than that generated by a shallow water wind turbine.

He stated that Blue H wanted MMS to recognize that deep-water floating wind turbine technology is currently a viable technology and not "10-15 years away," as had been stated by MMS. Additionally, he stated that Blue H wanted the Commonwealth of Massachusetts to recognize the technology's viability.

According to the manager for Blue H, he met with Bornholdt and Cluck on April 7, 2008, to discuss Blue H's nomination. During this meeting, the manager said that Bornholdt informed Blue H that their nomination will be reviewed with the "second round" of nominations because their nomination was not received prior to the original nomination deadline; such review would occur in June or July of 2008. The manager said that when he met Bornholdt at a conference in Delaware in mid-September 2008, Bornholdt told him that MMS would not be reviewing Blue H's nomination until after MMS finalizes their alternative energy regulations.

The Blue H manager was asked how long it would take Blue H to construct a commercially operational wind farm in comparable size to the Cape Wind Project in Nantucket Sound if Blue H were able to secure all the necessary permits, leases, and financial support. In response, he stated that he believes that Blue H could produce such a wind farm within three years; yet he stressed that prior to being able to submit an application for a commercial lease, Blue H needs to first deploy a

demonstration unit to establish the viability of the technology to potential investors and operational contractors.

When informed that MMS has stated that they received advice from the National Renewable Energy Laboratory (NREL) that such technology was 10-to-15 years in the future, the manager from Blue H stated that NREL is a private group that works closely with private interest groups that are competitors of Blue H, and therefore he questions their objectivity. In fact, he stated that NREL's lead scientist for wind technology, has misrepresented Blue H's deep-water technology's viability in some of his presentations. The Blue H manager concluded by stating that he speculates that certain scientists and researchers are trying to delay deep-water floating wind turbine technology because of their interest in developing shallow water technology.

An Engineer at the National Wind Technology Center, which is a division within NREL, was interviewed. The engineer stated that NREL is operated by the Alliance for Sustainable Energy, LLC, and is under contract with DOE to research renewable energy, including wind. He stated that he is responsible for leading research for offshore wind technology, along with other offshore renewable energy resources.

The engineer stated that he understood why the site of Nantucket Sound was chosen for the proposed wind farm. He explained that there are high winds in the sound, while there are typically not heavy tides/waves that would "generate an extreme load" on the monopiles supporting the turbines. Additionally, the engineer stated that maintenance-wise, the developer would have "good access" to the wind farm in Nantucket Sound. According to him, NREL has learned from European experiences that maintenance and "unanticipated costs" are the biggest costs related to offshore wind farms.

The engineer stated that MMS had informed NREL that they were only considering projects that could be commercially developed within five to seven years, and NREL does not consider deep-water floating wind turbine technology to be commercially feasible within that timeframe. When asked specifically about the claims made by Blue H that their company is poised to produce a commercially operative wind farm, he stated that he did not believe that would be possible. According to him, Blue H does not have the technology needed to construct and operate a commercial wind farm in deep water. He acknowledged that Blue H placed a prototype tension leg platform with a "small antiquated" wind turbine off the coast of Italy as a demonstration project. The engineer stated, however, that the platform was placed in a location that does not experience any noticeable waves and the wind turbine was far smaller than would be necessary for a deep-water wind farm. He explained that these two components are the two most important factors in attempting to develop deep-water wind technology because it is a combination of the these two factors, the waves and wind torque on a large wind turbine, which creates the "loads" on the structure. Accordingly, the engineer stated that Blue H's prototype did not really test deep-water wind turbine technology because neither of these two factors was present during their demonstration project.

The engineer stated that he agrees with Blue H's approach in trying to deploy prototype demonstration units in order to acquire the necessary information to advance floating wind turbine technology. When the engineer was informed, however, that the Blue H manager claimed that if Blue H was capable of securing the necessary financial support and permitting (leasing), Blue H could construct a commercial floating turbine wind farm comparable in size to the Cape Wind Project

within three years. He stated that he believes such a timeline is "not remotely realistic."

The engineer stated that he believes the Cape Wind Project itself is probably three years away, technology-wise, and the necessary technology needed to construct a commercial floating wind turbine farm is 10-to-15 years away – if they were to secure the necessary financing. According to him, even if NREL itself was capable of acquiring the necessary funding, partner with a turbine manufacturer, and receive all of the necessary technological support from the oil and gas industry related to tension leg platforms, NREL would not be able to construct a commercially operable floating turbine wind farm within a three-year timeframe.

The engineer stated that he believes deep-water wind farms will be the future of the industry and he applauds Blue H's desire to advance the technology. Based on his experience over the past 20 years developing wind turbine technology, however, he believes that the current state of floating wind technology today is similar to the state of onshore wind technology in the early 1980s. He stated that he wishes Blue H and other entrepreneurial companies the best of luck on their pursuits of deep-water floating wind turbine technology and stated that NREL would support their endeavors, however, He believes it would be damaging to the entire wind energy industry for a company to rush the development of a commercial wind farm in deep-water and have the farm fail due to the lack of technological acumen. He stated that he observed this scenario in the 1980s with development of onshore wind farms and the consequences set the industry back years due to the subsequent lack of confidence in the financial and political sectors that resulted.

Notwithstanding the specific issue surrounding Blue H's application, the issue of whether MMS too narrowly stated the project's purpose and need in the EIS's Purpose and Need Statement was reviewed by OIG's Office of General Counsel. OIG's Office of General Counsel opined: "Despite the unique circumstances surrounding Cape Wind as one of MMS's first alternative energy projects, the purpose and need statement for the Cape Wind EIS was narrowly drafted and, as a result, precludes MMS consideration of alternatives outside of its jurisdiction and concentrates on the objectives of the Cape Wind applicant. Nonetheless, the purpose and need statement is probably within the bounds of MMS discretion."

VII. In her complaint, Taylor alleged that MMS did not properly address the Cape Wind Project's lack of economic viability.

During his joint interview with Taylor and Carroll, Wattley stated that beyond the unanswered question of whether CWA can adequately finance the project, the draft EIS states that the project will not be economically profitable, but rather the cost of energy production is twice the current market rate. Wattley pointed out that Appendix F of the draft EIS contains an economic model established to assess the economics of the Cape Wind Project and other alternative sites identified by the draft EIS. On page 17 of Appendix F, MMS provides a table comparing the cost of energy for each of the different sites and states the following:

> The proposed site at Horseshoe Shoal has the lowest estimated cost of energy, equal to $0.122/KWhr, or $122/MWhr, while none of the sites appear to be profitable at today's electricity prices. The average locational marginal price for southeast Massachusetts, reported by ISO New England, Inc. for the real-time market, was

> $65.97/MWhr over the 2 year period from February 2005 through January 2007. For January 2007, the average price was $58.77/MWhr.

According to Wattley, this gap between the cost of electricity for the Cape Wind Project and today's electricity prices (double the cost) cannot be overcome by subsidies alone because the gap is too large. Wattley then produced an April 10, 2007 email authored by Cluck which stated:

> It is important to note that European experts are in a different boat. European wind farms are heavily subsidized by the government. In the U.S. a company must make a profit with limited government intervention (i.e. renewable energy credits) to succeed.

Based on Cluck's April 2007 statement in the above email that a "company must make a profit with limited government intervention [subsidies] to succeed," and the January 2008 draft EIS statement that "none of the sites (including the Cape Wind Project) appear to be profitable at today's electricity prices," Wattley concluded that these statements are clearly contradictory, yet MMS has never explained why they have changed their stance on the profitability issue.

Cluck stated that a draft EIS is not required to consider the economics of a proposed project under NEPA. He noted, however, that MMS did actually consider certain aspects of the economics involved in the project because it is the first proposed offshore wind farm in the country. He stated that under Appendix F of the draft EIS, MMS performed a type of economic "feasibility study" of the project to be used only for NEPA purposes; the study was not completed in an effort to assess "profitability" of the project.

Cluck explained that MMS is not obligated under NEPA or the draft regulations to verify CWA's ability to finance the project. He explained that MMS did not review "bank agreements" between CWA and banks to determine how they were receiving their financing for the project, but rather the feasibility study was an effort to assess whether the project was feasible based on current technology.

Wattley complained that the draft EIS shows that the project is not economically viable because it estimates that the cost of energy will be approximately twice that of current market rates. Cluck responded that it "is not MMS' job" to determine if CWA will make money or lose money on the project, but rather MMS is only responsible to assess whether the project is a financial possibility. Cluck pointed out that such offshore wind farms are operating off the coast of Europe successfully; thus it is clear that such projects are financially possible. In contrast, he stated that if a project being proposed had never been constructed anywhere in the world, a higher level of scrutiny would be warranted.

VIII. In her complaint, Taylor asserted that MMS failed to properly evaluate the presence and handling of hazardous materials used on the project during energy generation.

Carroll stated that the Electric Service Platform (ESP) that will be utilized in the Cape Wind Project will contain 40,000 gallons of coolant oil and MMS's draft EIS acknowledged that if a spill of the coolant oil were to occur, it has an over 90 percent probability of impacting the shoreline of Cape Cod, Martha's Vineyard, or Nantucket. He referred to the Executive Summary of an Applied Science Associates, Inc. Final Report 05-128, which is contained in the draft EIS.

Carroll stated that he has been asking CWA to identify the exact type of oil that will be used in the ESP (chemical composition) so that its impact resulting from a spill could be adequately assessed. To date, however, CWA still has not identified the exact oil they intend to use in the ESP. According to Carroll, the draft EIS identified the name of oil manufactured by Exxon that would be "similar" to the oil used in the ESP, but not the exact oil. As a result, Carroll stated that he has attempted to locate a Data Safety Sheet for the "similar" oil, yet he has not been able to do so. He stated that he even contacted Exxon directly, but could not locate a Data Safety Sheet. He further stated that he has requested MMS to produce a Data Safety Sheet for the proposed product "over 20 times," yet MMS has never responded to his requests.

Carroll then stated that the draft EIS contains no discussion regarding the resultant damage to the fishing grounds/industry, the tourism based economy, the beaches and inland salt marshes if an oil spill were to occur. Also, it contains no discussion of the potential clean-up efforts. Carroll stated that the draft regulations discuss "bonding of oil spills," yet the draft EIS makes no mention of this scenario. Carroll said that Cluck promised the draft EIS would contain a discussion regarding these potential impacts and clean-up efforts if a spill were to occur. According to Carroll, the lack of this discussion is a major failure of the draft EIS inasmuch as almost the entire economy of Cape Cod and the Islands is tourist and fishing industry based, which is dependent on its prime fishing grounds and beaches. Accordingly, any oil spill would destroy these areas and would shut down the economy for the entire affected area.

Cluck stated that he is certain that the general type of oil CWA plans on using is "not very hazardous." He further stated that he believes the oil will have similar qualities as mineral oil, which one could drink. However, when asked if he personally would drink the oil, Cluck said he would not.

Cluck then explained that the chances of a serious spill occurring is "incredibly low" since the oil will be contained in four separate containers that are "heavily insulated by rubber and steel." According to Cluck, the only way a serious spill could occur would be if the containers "were struck by a bolt of lightning or a real big ship." Cluck stated that in comparison to a spill of crude oil, the impact to the surrounding area of any potential spill of the oil to be used in the Cape Wind Project would be negligible.

MMS Deputy Director Cruickshank stated that he is certain that any oil storage component of the project will be required to have an oil spill response plan prior to its placement. Cruickshank stated that, under law, the operator/lessee would be responsible for all costs associated with a potential spill clean-up. Specifically, he stated that this is one of the areas that would be covered by the surety/bond that MMS would require of any lessee prior to allowing the construction and operation of any project. He stated that he believes that the oil response plan would not need to be in place until just prior to the project "breaking ground," and is not required by NEPA to be included in a final EIS.

IX. In her complaint, Taylor alleged that MMS was giving CWA a "sweetheart financial arrangement."

In his joint interview with Taylor and Wattley, Carroll said CWA was exempted under Section 388 of EPAct from having to competitively bid on the project. Carroll acknowledged that this exemption

was granted by Congress. He stated that the Senate inserted the language into the Act after it was passed by the House of Representatives, and by virtue of its deceptive wording, it was not identified by those disagreeing with the exemption until after the Act became law.

Cruickshank stated that Congress, not MMS, placed the exemption from competitive bidding for the Cape Wind Project in EPAct. Cruickshank stated that MMS learned of the exemption from competitive bidding for the Cape Wind Project, along with one other project, after the language was inserted in the legislation, but prior to EPAct being passed. He stated that MMS did not draft the language and was not consulted about its content, nor does he know who inserted the exemption language.

Bornholdt was asked if MMS had any discretion related to exempting the Cape Wind Project from a competitive bidding process that will be required for future alternative energy projects. She responded that an exemption was granted in EPAct specifically for ongoing projects by Congress and MMS had no say in granting the exemption because it was a "Congressional Act." According to Bornholdt, if a law directs MMS to take a certain action, MMS follows the law. Bornholdt then stated the "Congress is always the wisest" and "we [MMS] don't second guess Congress."

X. In her complaint, Taylor alleged that MMS failed to follow proper procedures for hiring a consultant to work on the Cape Wind Project EIS, selecting a firm favorable to wind development.

During their joint interview with Taylor, Carroll and Wattley stated that MMS hired TRC to prepare the EIS, yet TRC is a strong advocate for wind development and the company has a financial interest in the Cape Wind Project being approved. Accordingly, Carroll and Wattley concluded that the company has a direct conflict of interest and should not have been selected by MMS to produce an "objective" EIS.

Cluck stated that prior to MMS's review of the project, COE had hired a different contractor to assist in completing the draft EIS, yet they were found to "be in the pocket of CWA." Accordingly, COE released that firm and then granted the consulting contract to TRC after conducting a competitive bidding process. As a result, when MMS took over the responsibility of completing the draft EIS, Cluck stated that MMS believed it to be wise to retain TRC inasmuch as they were "up to speed" with the project, and according to Cluck, he has found TRC to be professional and objective.

XI. Environmental Protection Agency

Under section 309 of the Clean Air Act, the EPA has been appointed the overseer of all EISs, and the EPA provides technical and procedural advice to the various agencies completing EISs. EPA utilizes a rating system in reviewing EISs and ultimately has the authority to direct an agency to conduct further analysis in relation to a final EIS.

An environmental scientist and Betsy Higgins, Director of Environmental Review from EPA stated that EPA became involved in reviewing the Cape Wind Project in early 2002 when the project's EIS was being completed by COE, prior to the responsibility for the EIS being transferred to MMS after passage of EPAct. Higgins stated that EPA determined the draft EIS issued by COE was

"inadequate."

Higgins stated that EPA plays an advisory role under NEPA, wherein EPA reviews and comments on all EISs completed by federal agencies. According to Higgins, if EPA determines that a final EIS is "unsatisfactory," EPA would refer the matter to the Council on Environmental Quality for their attention. Higgins also stated that the NEPA process can be challenged in court by any citizen and EPA's comment letters can be used as evidence for the judicial proceeding because they are a part of the administrative record for the concerned project. According to Higgins, the court has the prerogative as to how the court assesses EPA's comment letters; she stated that deference is sometimes provided to the lead action agency, and other times deference is given to EPA's comment letters if they express serious concern with the final EIS findings of the lead action agency.

EPA issued a comment letter regarding the Cape Wind Project on April 21, 2008, to the draft EIS completed by MMS, which raised several concerns. On February 17, 2009, following MMS's issuance of the final EIS, EPA issued a comment letter to the final EIS.

In the cover sheet to EPA's draft EIS comment letter, EPA stated, "While the DEIS improves upon the Corps' DEIS, we believe additional work is needed, in close coordination with the cooperating agencies, between now and issuance of the FEIS [final EIS]."

On April 2, 2009, the environmental scientist and Higgins conducted a teleconference call with MMS to discuss EPA's comments to the final EIS. According to Higgins, MMS stated during the teleconference that, regarding the economic viability issue, MMS does not believe they should "second guess" a business decision of the applicant by determining whether or not a lease will be granted based on the business' potential profit or loss related to the project. MMS did, however, indicate that they will consider placing a deadline for commencing construction in the lease in order to keep the public informed and avoid the final EIS becoming stale prior to construction.

In their comment letter to the draft EIS, EPA stated the following regarding Air Quality issues:

> In general, EPA noted some areas where the DEIS [draft EIS] was incomplete with regard to the air issues. The following are general comments on additional analyses that MMS needs to undertake, and are followed by a series of specific comments and edits on a section by section basis. In general, MMS needs to:
>
> - Work with EPA to clarify whether and when different phases of the project are OCS [Outer Continental Shelf] sources under the Clean Air Act.
> - Clarify what emissions from which phases of the project would be addressed by permit under the Clean Air Act.
> - Conduct a conformity determination under the Clean Air Act that EPA and MMS can agree on, and that EPA can use to determine which emissions must be offset by General Conformity.
> - Clarify what emissions from which phases of the project would be addressed by General Conformity under the Clean Air Act.

After issuance of the final EIS, EPA stated in their final EIS comment letter the following:

> In comments on the DEIS [draft EIS], EPA noted that MMS did not conduct a Conformity Determination for the project. In November 2008 MMS submitted a Draft Conformity Determination to EPA. EPA noted several issues with MMS' Draft Conformity Determination, and stated those concerns in a letter to MMS on December 30, 2008. The FEIS included the original Draft Conformity Determination in Appendix I which did not address any comments or concerns provided in EPA's December 30, 2008 letter. EPA recommends that MMS work with us to address those concerns. A Conformity Determination will be necessary to support any Record of Decision for this project in the NEPA process, as well as the necessary air permit for the project.
> …
> There were inconsistencies between the FEIS [final EIS] and air permit application as to what equipment would actually be housed on the Electrical Service Platform.

According to Higgins, MMS must submit a revised Conformity Determination to EPA in order for EPA to issue an air permit for the project and this absolute requirement was discussed with MMS on the April 2, 2008 teleconference between EPA and MMS. After the teleconference, Higgins stated MMS indicated that MMS would discuss the issue with CWA, and send EPA a revised Conformity Determination that would overcome the deficiencies in the Draft Conformation Determination.

In addition to the specific concerns/comments EPA expressed in their comment letters to the EIS, the environmental scientist and Higgins were asked for their overall impression on how MMS handled the completion of the final EIS. According to Higgins, MMS tried to be more responsive than COE was prior to MMS taking over the project. Higgins stated, however, that it was clear that MMS was "under huge pressure" to complete the final EIS by a designated date, and as a result, Higgins believes that MMS did not conduct enough interagency meetings; she stated that in comparison to other EIS projects of similar magnitude, there was a noticeable lack of interagency meetings regarding the Cape Wind Project. Additionally, Higgins stated that she "was very frustrated" about the final EIS being rushed to meet the timeline associated with the end of the Bush Administration. According to Higgins, she sent Cluck emails detailing her frustration that she believed MMS was rushing the process unnecessarily, to which Cluck did not respond. Overall, Higgins stated that it was EPA's biggest concern that MMS was "scrambling to get it [final EIS] out the door."

XII. National Academy of Sciences

During our investigation into the issues raised by Senator Kennedy, Taylor, and Kenney, a separate issue was raised by Congressman William Delahunt's Chief of Staff Mark Forest. Forest submitted an email to the OIG stating that Section 1833 of EPAct required MMS to contract with the National Academy of Sciences (NAS) in order to provide MMS with objective, expert scientific advice regarding MMS' creation of an alternative energy program; yet after NAS submitted proposals for completing such work, "Nothing ever happened. They [NAS] were blown off."

In furtherance of our investigation into this issue, we identified a letter authored by former DOI Assistant Secretary for Land and Minerals Management C. Stephen Allred to Senator Jeff Bingaman, Chairman for the Committee on Energy and Natural Resources for the United States Senate. The

February 9, 2007 letter articulates reasons justifying why the department decided to not contract with NAS, as mandated in Section 1833. The letter concluded by stating that a similar letter was sent to Senator Pete V. Domenici, Ranking Member, Committee on Energy and Natural Resources; Representative Nick J. Rahall, Chairman, Committee on Natural Resources; and Representative Don Young, Ranking Member, Committee on Natural Resources.

***Agent's Note**: We could not determine whether the department or MMS received a response to this letter from any of the Congressional recipients. Our investigation into this issue, however, identified the following considerations taken by MMS that led to Allred's February 2007 letter to Congress explaining the Department's decision to not contract with NAS.*

Section 1833 of the EPAct states that the Secretary of the Interior "shall" enter into a contract with NAS under which NAS will study the potential for alternate energy sources, assess the current laws related to the development of those resources, and then "recommend statutory and regulatory mechanisms for developing those resources."

Bornholdt was provided Section 1833 of EPAct, and after her review of the language, was asked if MMS contracted with the NAS, as directed by Congress, to complete the work outlined in the section. Bornholdt stated not to her knowledge. She stated that she has no personal opinion whether MMS "followed the law" with respect to this section.

After being informed that NAS had sent a scope of work and proposal to MMS in January 2006, in which she was a recipient, Bornholdt was provided a letter signed by former MMS Director Johnnie Burton on June 6, 2006, to NAS stating that MMS would not contract with NAS to perform the work outlined in Section 1833.

Tom Readinger is the former MMS Associate Director for Offshore Minerals Management. Readinger was informed that OIG had identified a set of emails in which he as Associate Director for MMS, opined why he believed MMS should not contract with NAS to conduct the study outlined in Section 1833 of EPAct. After reviewing the emails with Readinger, Readinger confirmed that he expressed the following reasons for not contracting with NAS:

1) The Bureau of Land Management (BLM) had contracted with NAS prior for a separate issue and they were not happy with the NAS study report provided to them;
2) EPAct provided no funding for the NAS study;
3) OMB had "eliminated funding" for FY07, thus indicating a "signal of non-support for the NAS study;
4) The Department of Energy had completed comparable studies; therefore the NAS study "won't add anything";
5) The "NAS study could bring policy implications which will be hard to control" by "tying our [MMS]' hands with recommendations on statutory/regulatory mechanisms."

Readinger explained his comments about how the "NAS study could bring policy implications which will be hard to control" by "tying our [MMS]' hands with recommendations on statutory/regulatory mechanisms." According to Readinger, NAS reports that had been contracted in the past by MMS had always provided policy recommendations, in addition to their scientific findings. Readinger

explained that this resulted in situations where MMS had been handcuffed by NAS reports in creating its own policies because the studies, in effect, placed obligations on MMS to explain why they may not follow the policy recommendations made by NAS. Readinger stated that this situation impacts MMS's discretion to create energy policy and therefore is undesirable.

After reviewing Section 1833 of EPAct, Cruickshank stated that he was not the "point man" for MMS in deciding against a contract with NAS, as directed by Congress. He acknowledged, however, that he was in the chain of command and was aware of the discussions within MMS concerning the potential NAS study. According to Cruickshank, he never communicated directly with NAS concerning the study.

Cruickshank stated that, based on his "big-picture memory" of the issue, both BLM and MMS were directed to contract with NAS, yet BLM immediately "backed out" by stating that they were not interested in contracting with NAS. According to Cruickshank, BLM had recently completed a PEIS that had analyzed many of the same areas Section 1833 considered in the potential NAS study, and therefore BLM did not feel the NAS study would be helpful to them.

Cruickshank stated that EPAct did not authorize any funding for the Section 1833, study and the proposal submitted by NAS to MMS was "very broad in scope" and expensive (i.e. $875,000). Accordingly, inasmuch as MMS would have been forced to tap its existing budget in order to fund the study, Cruickshank stated that MMS attempted to narrow the scope of the study in order to both make it affordable and useful to MMS. Cruickshank explained that MMS believed much of the information considered in the study proposed by NAS could be obtained from other sources; therefore he said that MMS felt it did not need to fund such a broad, duplicative study.

In turn, Cruickshank stated that the Department offered to fund a far smaller study but NAS declined because they have a certain scope/funding threshold that was not met by MMS' offer. According to Cruickshank, it was his understanding that the ultimate decision to make the small counteroffer to the NAS proposal was made through the Department's Energy Coordination Council that was created in order to oversee the implementation of EPAct on behalf of DOI.

Cruickshank acknowledged that the purpose of Section 1833 appears to have been an effort by Congress to direct DOI to obtain objective, expert advice from outside the Department in order to assist in developing an innovative, far reaching alternative energy program and concomitant regulatory framework. According to Cruickshank, however, regardless of MMS's failure to contract with NAS, the Department did seek extensive advice and data from scientists and laboratories outside the Department in furtherance of developing the program and regulations via workshops and conferences.

We interviewed two directors from NAS. One director explained that certain studies are mandated by Congress in different manners. Congress may include direction to a Federal agency to conduct a specific study in either an Authorization Bill or an Appropriations Bill. According to him, an Appropriations Bill will include funding for the specific study, and accordingly, the Federal agency is much more willing to contract for the study since they are not required to pay for it out of their own operating budget. If direction to contract for a specific study is included in an Authorization Bill, however, the study is not necessarily funded, and therefore unless Congress later appropriates funds

for the study, the Federal agency would need to pay for the study from their own budget. The EPAct was an Authorization Bill, not an Appropriations Bill.

According to this director, when a study is directed in an Authorization Bill, unless the agency already planned on conducting a similar study or believes the study could be very helpful, often the agencies being mandated to conduct the study "claim poverty" and accordingly are not so eager to contract with NAS for the study. He stated that NAS has observed this scenario many times. According to him, when this scenario occurs, the onus of "pressuring" the agency to contract for the study then falls back onto Congress. He explained that the Congressional Committee or Congressperson responsible for the study language in the law often needs to pressure the agency to complete the study; yet if this does not occur, in a practical sense, the agency is allowed to simply ignore the mandate.

The second director stated that he remembered discussing the study mandated by Section 1833 with MMS after passage of EPAct, although MMS was very distracted at the time by Hurricane Katrina and its aftermath. As a result, he stated that NAS prepared their proposal for the study and delivered it to DOI and MMS for their consideration. He confirmed that NAS was eventually informed in the June 6, 2006 letter from DOI that the Department was not interested in contracting for the study outlined in the proposal proffered by NAS, but rather the Department could offer "about $25,000 to $30,000" for a review of the overlap of regulatory framework. According to him, he would be hard-pressed to think of any study NAS could complete for such a small sum of money.

XIII. Cape Wind Associates (Cape Wind Project developer)

Dennis Duffy is the Vice President of CWA. Duffy stated that Energy Management, Inc. (EMI) is the parent company of CWA and Duffy also serves as the Vice President of EMI. According to Duffy, EMI has been in the energy business in New England for the past 30 years and has always had a focus on conservation-related energy projects. He stated that approximately 10 years ago EMI decided that wind energy was a promising, conservation based industry that could potentially prosper in New England, and after researching the wind energy industry, EMI determined that the most financially feasible wind project in New England would be located offshore. Duffy stated that EMI then conducted studies on the New England coastline and determined that the Nantucket Sound was the most feasible, promising site for an offshore wind farm. Accordingly, EMI created CWA and submitted an application/proposal to COE in 2001 to construct the Cape Wind Project on Horseshoe Shoals in Nantucket Sound.

Duffy explained that the reasons CWA chose Nantucket Sound as the most feasible, promising location for the Cape Wind Project. He stated that the following factors contributed to CWA's decision:

- Depth of Water (Nantucket Sound is shallower that locations outside of the Sound);
- Storm Waves (Nantucket Sound experiences far less extreme storm waves than areas outside of the Sound);
- Proximity to the Energy Grid (Nantucket Sound is closer to the energy grid than areas outside of the sound);
- Wind Resources (Nantucket Sound offers excellent wind resources);

- Substrata (Horseshoe Shoals' terrain is suitable for wind turbine monopiles).

Duffy stated that CWA was aware that the site would be controversial when they chose it inasmuch as it is triangulated within three of the wealthiest resort areas in the country (Nantucket, Martha's Vineyard, and Cape Cod); CWA did not want to select a location "within view of yacht clubs." Duffy explained that CWA deemed that any other location outside Nantucket Sound was not economically feasible or commercially viable.

In relation to CWA's selection of Nantucket Sound for the project, Duffy stated that CWA has legally defended itself in several different legal forums that the scope of the Purpose and Need Statement in the EIS was proper, and not "too narrow." Duffy explained that opponents to the Cape Wind Project have repeatedly argued that the Purpose and Need Statement in the EIS was too narrow because it did not consider every potential energy alternative imagined. According to Duffy, CWA has successfully argued in court that the Purpose and Need Statement in the EIS for the project meets the "reasonability standard" that needs to be applied when evaluating its scope.

Duffy stated that since CWA submitted their proposal to construct the Cape Wind Project, CWA has been mired in eight years of bureaucratic red-tape and lawsuits. During that time frame, however, the COE issued a favorable draft EIS for the Cape Wind Project and MMS has issued both a "very favorable" draft EIS and final EIS for the project. Additionally, Duffy stated that CWA "has won all 11 court decisions" throughout several jurisdictions after being sued in relation to several different aspects of the project's review.

Duffy stated that CWA has never refused a request from the lead action agency, initially COE and now MMS, for any informational studies, including avian studies. According to Duffy, there are 17 participating agencies reviewing the project, and often there is no consensus amongst the agencies on what studies they request of CWA. As a result, CWA has been responsive to the lead agency, as needed; CWA cannot satisfy all of the requests made by all the agencies involved in reviewing the project, among them FWS.

Duffy further stated that the Cape Wind Project has completed "more pre-construction avian studies that any other project in the world." He stated that CWA has, in many cases, gone well beyond what is required under NEPA and the ESA in conducting avian studies for the project. Moreover, Duffy stated that there is "limited utility" in some of the requested studies, and it needs to be "kept in mind" that pre-construction avian activity does not necessarily coincide with post-construction activity.

Duffy further stated that the "gold standard" for avian research and studies for the area is the Massachusetts Audubon Society (MAS), which initially opposed the Cape Wind Project. Based on the studies CWA undertook and CWA's willingness to adopt an "adaptive management" approach to the avian impacts of the project, however, MAS is now a supporter of the project. In addition, Duffy stated that most other national conservation organizations are supporters of the project, including the National Resource Defense Council.

Duffy stated that CWA has repeatedly been called upon to respond to the allegation that CWA has not conducted the necessary studies needed to adequately assess the potential avian impact of the Cape Wind Project, specifically including the claim that a three-year, 24/7 radar study needs to be

conducted. He provided a response letter submitted to FWS on March 28, 2005, wherein CWA argued their "opposition to non-voluntary or expanded application of FWS' interim guidance on avoiding and minimizing wildlife impacts from wind turbines (the Guidance)."

Duffy stated that, at a very high cost, CWA paid for a "jack-up barge" to be brought to Nantucket Sound from the Gulf of Mexico and radar studies were conducted for several significant periods of time. According to Duffy, CWA was warned of the safety hazards related to conducting such radar studies during inclement winter weather, and therefore CWA did not attempt to conduct such studies. In fact, he stated that since that time, a person was killed attempting to conduct a similar avian radar study off the coast of Delaware during inclement winter weather. Moreover, Duffy stated that the radar data that would be collected during such inclement weather has limited value because the radar is not effective in such weather.

With respect to the FAA's Presumed Hazard Determination issued in February 2009, Duffy stated that CWA is working with the FAA in reaching mitigating terms that would overcome the determination. He stated that similar to requests by the lead action agency for the EIS (MMS), CWA will comply with all requests made by the FAA related to air navigation issues. After being informed that all three airport managers from the surrounding airports on Cape Cod, Martha's Vineyard, and Nantucket have expressed their concerns with the project's impact to air safety for the area, Duffy stated that he believes the local airport boards "are heavily politicized," and the "political pressure has been intense for anyone who can throw up a roadblock" to the Cape Wind Project.

Duffy commented on the concerns of the local ferry operators in the Nantucket Sound regarding the impact of the wind farm on safety and their businesses by stating that USCG has reviewed the issues related to sea navigation and they have determined that "all issues can be mitigated." Accordingly, Duffy stated that CWA feels comfortable that the sea navigation issues have been considered by the correct agency responsible for such issues (USCG).

With respect to the turbine availability issue, Duffy stated that CWA's proposal for the project does not state that they will be using GE's 3.6MW wind turbine, but rather it stated that CWA intended to use a "3.6MW +/- wind turbine," which allows for flexibility as to the size and manufacturer of the turbine actually used in the project. Duffy further stated that CWA will not attempt to use any wind turbine that would be deemed to be a "material change" from the size of the wind turbine considered in the final EIS, thus triggering the need for a supplemental EIS.

Duffy stated that CWA is legally comfortable with the amount of pre-construction studies they have conducted and provided to the several Federal and State agencies for their consideration, and CWA is confident they would prevail in a court of law on these grounds if challenged. He further stated that CWA has amply complied with all of the government processes required of CWA under the law. Duffy believes any legal challenges lodged against CWA if the project is approved will simply be based on the fact that the "some people just don't like the result," and CWA will be able to defend itself successfully in Federal court.

XIV. Timeline for release of final EIS

MMS's Cape Wind Project Manager Cluck stated that MMS Director Luthi had established the goal

to have both the final EIS and ROD completed prior to the end of 2008. He stated that he believes such a timeline was first discussed shortly after receiving the comments to the draft EIS in April 2008. According to Cluck, he never heard directly from anyone that the timeline was tied to the January 20, 2009 change of presidential administrations. He stated, however, that it was clearly "implied" that the Bush Administration would prefer to complete this process prior to their departure, if possible.

Cluck denied that neither he nor MMS was being told to rush and "cut corners" in order to have the Cape Wind Project approved prior to the departure of the Bush Administration. He stated that MMS was asked to work hard on completing its assessment of the project, yet MMS was not asked to rush the project in lieu of being thorough or place pressure on any cooperating agencies to do the same.

SUBJECT(S)

Minerals Management Service

DISPOSITION

This Report of Investigation will be forwarded to the Department and Minerals Management Service.

ACRONYMS

AFB	Air Force Base
ANPR	Advance Notice of Proposed Rulemaking
BLM	Bureau of Land Management
BO	Biological Opinion
CGMTAct	Coast Guard and Maritime Transportation Act of 2006
COE	U.S. Army Corps of Engineers
CWA	Cape Wind Associates
DOD	U.S. Department of Defense
DOI	U.S. Department of the Interior
EIS	Environmental Impact Statement
EMI	Energy Management, Inc.
EPA	Environmental Protection Agency
EPAct	Energy Policy Act of 2005
ESA	Endangered Species Act
ESP	Electric Service Platform
FAA	Federal Aviation Administration
FR	Federal Register
FWS	U.S. Fish and Wildlife Service
GE	General Electric Company
IFR	Instrument Flight Rules
MAS	Massachusetts Audubon Society
MBTA	Migratory Bird Treaty Act

MFP	Massachusetts Fishermen's Partnership, Inc.
MMS	Minerals Management Service
MOU	Memorandum of Understanding
NAS	National Academy of Sciences
NEFO	U.S. Fish and Wildlife Service' New England Field Office
NEPA	National Environmental Protection Act
NHPA	National Historic Preservation Act
NREL	National Renewable Energy Laboratory
OCS	Outer Continental Shelf
OIG	Office of Inspector General
OMB	Office of Management and Budget
PEIS	Programmatic Environmental Impact Statement
PMI	MMS' Policy and Management Improvement Division
PVA	Passenger Vessel Association
ROD	Record of Decision
RPM	Reasonable and Prudent Measures (Biological Opinion)
SAR	Search and Rescue
SOL	Office of the Solicitor
TRC	TRC Environmental Corporation
USAF	U.S. Air Force
USCG	U.S. Coast Guard
VFR	Visual Flight Rules
WMNSA	Woods Hole, Martha's Vineyard and Nantucket Steamship Authority